91-212

No. 91-

In The

Supreme Court of the United States

October Term, 1991

WESTERN PALM BEACH COUNTY FARM BUREAU, INC., ROTH FARMS, INC. and K.W.B. FARMS,

Petitioners,

v.

UNITED STATES OF AMERICA,

FLORIDA KEYS CITIZEN COALITION, FLORIDA WILDLIFE FEDERATION, ENVIRONMENTAL DEFENSE FUND, SIERRA CLUB, NATIONAL WILDLIFE FEDERATION, WILDERNESS SOCIETY, NATIONAL PARKS & CONSERVATION ASSOCIATION, DEFENDERS OF WILDLIFE, FLORIDA AUDUBON SOCIETY and TREASURE COAST ENVIRONMENTAL COALITION,

SOUTH FLORIDA WATER MANAGEMENT DISTRICT and TIMER E. POWERS, its Interim Executive Director, FLORIDA DEPARTMENT OF ENVIRONMENTAL REGULATION and CAROL M. BROWNER, its Secretary,

FLORIDA SUGAR CANE LEAGUE, INC., FLORIDA FRUIT and VEGETABLE ASSOCIATION, BEARDSLEY FARMS, INC., CITY OF BELLE GLADE, and CITY OF CLEWISTON,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Case-or-Controversy limitation on the Article III judicial Power requires that a Court of Appeals take up and decide its jurisdiction and the district court's when, before its decision on an underlying appeal is final, the justiciability of the cause is questioned for lack of consent by the State to a federal court suit demanding a particular exercise of the State's sovereign codemaking function.

2. Whether the Case-or-Controversy limitation which in the interests of federalism bars a federal court action by a citizen against an unconsenting State, to compel its particular exercise of sovereign codemaking functions, pertains as well to actions by the United States having no superior right under the Constitution or any Act of Congress.

3. Whether the "clear statement" standard of judicial scrutiny, required of federal courts in other contexts to prevent unwarranted intrusion on sovereign State functions, also constrains federal court interpretation of a State statute that is depended on for consent to a federal court suit seeking, under no claim of right in the Constitution or Act of Congress, a judicial performance of the State's regulatory codemaking.

4. Whether the "clear statement" standard likewise and for the same reasons governs a federal court's interpretation of a contract to ascertain claimed promises by the State, to the United States, to promulgate and enforce a State regulatory code having a strategy and stringency as necessary to protect United States proprietary interests.

STATEMENT CONCERNING THE PARTIES

All parties to the proceedings before the Court of Appeals are named in the caption.

Petitioners here were intervenor-appellants in the Court of Appeals, as were the parties last named in the caption as respondents. The United States of America was an appellee in the Court of Appeals, as were the Florida agencies named here as respondents. The environmental organizations named here as respondents were intervenor-appellees in the Court of Appeals, supporting the position of the United States. Rule 14(b).

The complete style of the case showing the alignment of the parties in the Court of Appeals is set out in the Appendix at A21 and A22.

No corporate parent companies or subsidiaries are to be listed by the corporate petitioners pursuant to Rules 14.1(b) and 29.1.

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OPINIONS BELOW

The opinion of the Court of Appeals in the underlying cause is reported at 922 F.2d 704 (11th Cir. 1991) and is set out in the Appendix to this petition at A1 et seq.

The Order of the Court of Appeals that "We decline to consider" petitioners' Suggestion and Motion as to Lack of Jurisdiction is set out in the Appendix at A24. The Court's Order denying the motion of Sugar Cane Growers Cooperative of Florida "for leave to appear as amicus curiae to suggest lack of jurisdiction in this and the district court for want of a justiciable case or controversy" appears in the Appendix at A23.

JURISDICTION

The opinion of the Court of Appeals (A1) was entered on January 28, 1991. Its Orders declining to take up and consider the questions of its and the district court's jurisdiction were entered on March 6 and 22, 1991 (A23, 24). Timely motions for rehearing of the underlying decision were then pending. The Court's Order denying those motions for rehearing was entered on May 7, 1991 (A29). This petition therefore is timely. Rule 13.

Jurisdiction to review the judgment in question is conferred on this Court by 28 USC § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article III, Section 2, Constitution of the United States:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution [or] the Laws of the United States . . . – to Controversies to which the United States shall be a Party; . . . .

Section 403.412, Florida Statutes (1989):

> (2)(a) The Department of Legal Affairs, any political subdivision or municipality of the state, or a citizen of the state may maintain an action for injunctive relief against:
>
> 1. Any governmental agency or authority charged by law with the duty of enforcing laws, rules, and regulations for the protection of the air, water, and other natural resources of the state to compel such governmental authority to enforce such laws, rules, and regulations; (excerpt only; complete text in Appendix A31-33)

STATEMENT OF THE CASE

The asserted basis for jurisdiction (A34) in the Article III court of first instance, the District Court for the Southern District of Florida, was that this is a "Controvers[y] to which the United States shall be a Party," or is a "Case . . . arising under this Constitution [or] the Laws of the United States," Art. III, Sec. 2, U.S. Const., and as such is assigned by 28 USC § 1331 and 28 USC § 1345 to the district court. Rule 14.1(i).

This Petition concerns that jurisdictional assertion and the associated standards for ascertaining a Case or Controversy in such a federal suit against a State as sovereign, to compel a particular performance by the State of its sovereign codemaking functions.

To arrest the degradation of "the surface waters of the state" and improve their "ecological, aesthetic, recreational, and economic value," the Florida legislature by its Surface Water Management and Improvement Act of 1987 (the "SWIM Act"), Fla. Stat. § 373.451 et seq. (1990), created regional water management districts and required them to generate, promulgate and enforce regionally, under statewide supervision by respondent Department of Environmental Regulation ("DER"), a complex regulatory code called a SWIM Plan.

Respondent South Florida Water Management District ("the Water District") is that regional codemaking authority in south Florida. Opinion below, A7-10, *passim*.

To guide this codemaking, Florida's legislature enacted as law certain "unspecific" "Narrative State Law Standards" and DER by rules promulgated others – "narrative" and "unspecific" being terms of the Court of Appeals. A7-10. Those standards the Court described[1] as prohibiting, for example, any permit process that would allow degradation of certain designated "Outstanding

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[1] The Court of Appeals summary of narrative standards itself reflects choices of interpretation and policy that were the agencies' to make in authentic Florida administrative proceedings, but the summary serves well enough for present purposes.

Florida Waters" below the quality they had in 1979; forbidding regulated acts that would create "an imbalance in natural populations of aquatic flora or fauna"; and directing the Water District itself not to divert nutrient-ladened waters previously discharged in Lake Okeechobee to destinations including Everglades National Park "in such a way that the state water quality standards are violated [or] that the nutrients in such diverted waters adversely affect indigenous vegetation communities or wildlife." Opinion, A7-8, fn. 5.

The Court of Appeals described the Water District as well advanced in its codemaking, 922 F.2d at 707-08, A9:

> The Water District has issued a draft "Surface Water Improvement and Management Plan for the Everglades" . . . which proposes numeric standards for implementing the SWIM Act's requirements, and the Water District is currently working on a final version.

These "waters of the state" in south Florida have for years served various and sometimes inconsistent needs including those of a coastal population dependent on them for drinking and hydrolic pressure against salt water intrusion; a Lake Okeechobee population whose ravaging by 1947 storms and floods moved Congress and Florida jointly to complete over time the Central and Southern Florida Project which manages these waters through a massive system of canals, storage areas, gates, pumps and other structures generally depicted at A53; a farming industry in the ancient floodplain south and east of Lake Okeechobee, where the eons left thick deposits of black muck; and remnants of the vast primeval Everglades wetlands including State "water conservation

areas" south of the privately-owned "Everglades agricultural area" and, still further south, the Everglades National Park. *See* generally, Map A53.

Fed by rivers and lakes to the north and by rainfall locally and up gradient, these "waters of the state" flow south and southeast by the natural contour and by governmental (State and Corps of Engineers) operation of the canals, structures and conservation areas to collect, store, release and divert water as needed for various purposes. Thus was the historic cycle of flood and drought, which suppressed human life and property while promoting the unique animal and floral wildlife that characterized the ancient Everglades, subdued to human control and purpose.

The Park was founded in 1934 by an Act of Congress authorizing its acquisition. As amended, 16 USC § 410 et seq. With added lands the Park now contains some 1.4 million acres of the southernmost Florida mainland (A42). The Park's purpose as expressed in 1934 was to be "permanently reserved as a wilderness," "preserv[ing] intact . . . the unique flora and fauna and the essential primitive natural conditions now prevailing." § 410c. In the years since, Congress found in 1989, the Park "has been adversely affected and continues to be adversely affected by external factors which have altered the ecosystem including the natural hydrologic conditions within the park," § 410r-5(a)(1), (4) (extending the boundaries, with State cooperation, to "limit further losses").

The other federal property involved is the "Loxahatchee Wildlife Refuge," a name given federally to State-owned lands designated Water Conservation Area

No. 1, which in 1951 the Water District's predecessor agency (A63) licensed to additional use by the U.S. Fish and Wildlife Service for "conservation of wildlife, fish, and game, and for other purposes embodying the principles and objectives of planned multiple land use" (A64). The "Cooperative and License Agreement" authorizes "maintenance and development of wildlife environments and habitat where such use is not inconsistent with the use of land for flood control and water retention purposes." ¶ 2(a)(2), A65. The Area adjoins the Everglades agricultural area on the southeast, and their common boundary is a canal in which water flows from the agricultural area. See map, A53.

In 1984, to protect "the quality of water entering Everglades National Park," the United States and the Water District made a "Memorandum of Agreement" (A54) providing among other things that Total Phosphorus shall not exceed .24 mg. per liter, or parts per million, in surface waters delivered to the Park (A54, 58), and further: "Federal, State, and local water quality criteria which are more stringent that those appended criteria shall continue to apply." No more stringent water quality criteria have been promulgated. This action by the United States is to compel their State promulgation with a regulatory strategy and stringency that is satisfactory to the United States; or, as the Court of Appeals described it "from a different angle," 922 F.2d at 709 fn. 7, A 11 fn. 7, "to move a state administrative task . . . to federal court."

No Act of Congress creates any public or private right nor any duty by the State as regards these waters, or their use by Florida agriculture, or their nutrient content

in any of the Water Conservation Areas (including Loxahatchee) or indeed in the Park. Federal EPA regulations under the Clean Water Act, 33 USC § 1251 et seq., specifically exempt from point source and non-point source regulation "return flows from irrigated agriculture or agricultural storm water runoff." 20 CFR §§ 122.2, 122.3.

The regulation of these waters is a matter of State law exclusively. The Complaint below by the United States alleges, presumably in service of its jurisdictional invocation of 28 USC § 1331 in addition to § 1345, that in founding Everglades National Park Congress expressed a preemptive regulatory purpose that now is codified as 16 USC § 410c. Purporting thus to quote that Act of Congress in ¶ 28(b) of the Amended Complaint, A42, the United States alleges that Congress mandates (emph. added):

> [the Park area] "shall 'be permanently reserved as a wilderness and *no development of the project or plan . . . shall be undertaken which will interfere* with preservation intact of the unique flora and fauna and the essential primitive natural conditions now prevailing in this area.' "

The Act of Congress itself, with the omitted words restored, says something quite different: "[N]o development of the project or plan *for the entertainment of visitors* shall be undertaken . . . . " 16 USC § 410c (emph. added).

In the name of the United States, the U. S. Attorney filed this action in the District Court for the Southern District of Florida seeking a judgment against the State of Florida as sovereign, i.e., a judgment that "would . . . interfere with the public administration" and whose effect would be "to restrain the government from acting, or to

compel it to act." *Dugan v. Rank*, 372 US 609, 620 (1963), quoted in *Pennhurst State School & Hosp. v. Halderman*, 465 US 89, 101 fn. 11 (1984).

Counts I and II (A42, A45) allege "DER AND SFWMD [the Water District] HAVE VIOLATED STATE LAW" by failing as yet to promulgate and enforce a regulatory code effectuating the "narrative" standards of Florida law with such stringency against the Farm Interests – such as petitioners – as will adequately protect United States proprietary interests in the Park and Water Conservation Area No. 1, the Loxahatchee Refuge. The redress sought (A50), as described by the Court of Appeals reversing, on that account, the district court's denial of intervenor status to the Farm Interests, is the federal judicial performance of the State's own self-prescribed codemaking function. *United States v. South Florida Water Management Dist.*, 922 F.2d 704, 708, 709 n.7 (11th Cir. 1991), A8, A11 fn. 7:

> If it finds for the United States on Count I and grants the relief requested, the District Court will in effect translate the narrative water quality standards in the SWIM Act into numeric limits.
>
> Viewed from a different angle, Count I of the Complaint seeks to move a state administrative task – development of standards for implementing the broad commands of the SWIM Act – to federal court.

"The problem" with this "move . . . to federal court," the Court of Appeals acknowledged, is of course that Florida law commits its codemaking to its own authorized agencies acting according to State administrative law. 922 F.2d at 708, A9:

> The problem is that the SWIM Act directs the Water District to conduct administrative proceedings toward this same end – translating the Act's narrative standards into specific numeric limits.

Concerning this "move . . . to federal court," therefore, the Court of Appeals stated: "If the state is not doing its job *and statutory authority supports federal proceedings, this move is legally proper.*" 922 F.2d at 709 fn. 7, A 11 fn. 7 (emph. added).

The only Florida statute that bears on this question, § 403.412, Fla. Stat. (1989), appears in its entirety at A30 et seq. Its essential terms are:

> (2)(a) The Department of Legal Affairs, any political subdivision or municipality of the state, or a citizen of the state may maintain an action for injunctive relief against:
>
> 1. Any governmental agency or authority charged by law with the duty of enforcing laws, rules, and regulations for the protection of the air, water, and other natural resources of the state to compel such governmental authority to enforce such laws, rules, and regulations; . . .

The statute speaks of Florida court processes and remedies in some detail of implementation (A32, A33), but contains no reference, either clear or not clear, to suits against its agencies by anyone, let alone by the United States, in federal court.

Counts III and IV of the United States complaint (A47, A49) allege a breach by the State of Florida of "EXPRESS CONTRACT" promises to the United States, both in the 1984 Everglades National Park contract (A54)

and in the 1951 Cooperative and License Agreement concerning Conservation Area Number One (A63).

Count III based on the Everglades Park contract does not allege a violation of the .24 mg./ltr. or ppm limit on Total Phosphorus in waters supplied to the Park (A54, A58), as specified in the contract. The Court of Appeals noted that the United States is dissatisfied even with the Draft SWIM Plan's limit of .03 ppm on Total Phosphorus at the release point far north of the Park – a limit *one-eighth* of the .24 ppm limit specified in the 1984 Park Agreement in waters as delivered to the Park. 922 F.2d at 710, A13.

The principal breach alleged ¶ 53 A48 is of the State's alleged promise to "ensure that surface waters delivered to the Park are of sufficient purity to prevent ecological damage or deterioration of the Park's environment." That is not quoted from any promise in fact in the Contract, but rather is fabricated from this preliminary recital in the Contract (A54, emph. added):

> Since the Congress, in connection with the Everglades National Park, has directed the Corps and the National Park Service "to reach an early agreement on measures to *assure that the water delivered to the park is of sufficient purity to prevent ecological damage or deterioration of the park's environment,*" (River Basin Monetary Authorizations and Miscellaneous Civil Works Amendments, Senate Report No. 91-895, p. 24); and. . . . [two other recital paragraphs]
>
> THEREFORE, the Corps, NPS, and WMD (parties) mutually agree to the following:. . . .

Count IV of the Complaint (A49) alleging the State's breach of its "EXPRESS CONTRACT" with the United

States in the 1951 agreement licensing use of Water Conservation Area Number One, or Loxahatchee, did not purport to identify any promise by the State in that contract concerning water flowing into the Area. The contract in fact contains no such promise (A63 et seq.).

When the Court of Appeals filed its opinion which for the first time recorded details of the United States claim, as stated in oral argument, A8 fn. 6, the intrusive effect of this action upon sovereign functions of the State became more clearly evidenced than before. Petitioners therefore, and a nonparty Farm organization as a prospective amicus, filed a "Suggestion and Motion as to Lack of Jurisdiction" (A24) and a "motion for leave to appear as amicus curiae to suggest lack of jurisdiction in this and the district court for want of a justiciable case or controversy."

The Court simply "DENIED" the proposed amicus raising of the Case-or-Controversy issue (A23), and declined to consider petitioners' "Suggestion and Motion as to Lack of Jurisdiction," saying the federal judicial Power's want of Article III jurisdiction cannot be raised on such an appeal, by such parties (A24):

> As we held in our opinion in the underlying appeal, the Farm Interests may intervene in this case to protect their right to participate in the development of numeric limits implementing the state's narrative water quality standards. The jurisdiction issues that the Farm Interests raise in their motion are only indirectly related to the protection of this right. Further, the Farm Interests are adequately represented on the jurisdictional issues by the defendants South Florida Water District and Florida Department of Environmental Regulation, which have

> already raised many of these issues with the District Court. Finally, even if the Farm Interests were proper parties to raise the jurisdictional issues in their motion, it would be procedurally inappropriate for us to extend our limited appellate review under the anomolous rule to decide issues not raised in the parties' briefs or in this Court's published opinion.
>
> The Farm Interests may still seek to present their jurisdictional motion to the District Court. If they choose this step, they will be well advised to ask the District Court's permission first. As we have stated, the District Court may condition the Farm Interests' intervention in this case on such terms as will be consistent with the fair, prompt conduct of this litigation. This authority allows the District Court to dispose in summary fashion (as we have done here) of any motions that the Farm Interests may file beyond the scope of their right to participate in these proceedings.

The Court then remanded the three-year old litigation for further proceedings in the district court. Petitioners then timely filed this petition for writ of certiorari.

REASONS FOR GRANTING THE WRIT

1. Question 1 above stated: whether the Court of Appeals was obliged to take up and consider the question of its jurisdiction.

This Court until now has held inferior federal courts to the invariable duty of noticing, sua sponte if necessary, any question of the want of jurisdiction. No agreement or concession of jurisdiction by the parties is of any effect.

E.g., Lewis v. Continental Bank Corp, 494 U.S. 472 (1990); *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986); and *Juidice v. Vail*, 430 U.S. 327, 331 (1977). The Court of Appeals indeed *asserted* its "Jurisdiction" in a lesser and derivative sense, under the Circuit's so-called anomalous rule authorizing appeals from district court orders denying intervention (A4). The reasons given by the Court for refusing to determine its jurisdiction (A24) serve only to shield the Court's want of jurisdiction and to impose the federal judicial Power upon State-regulated citizens whose economic livelihood is at stake, the Court recognizes (A15), but who are said to have no interest at *federal common law* requiring that their objection be heard (A16).

The State agencies who should have joined the jurisdictional objection in the Court of Appeals instead stood by acquiescing. Never in this lawsuit, the full record will disclose, have the State agencies described the federal judiciary's want of Case-or-Controversy jurisdiction as would "self-interested parties vigorously advocating opposing positions." *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 403 (1980), describing the essentials of justiciability. Never have they attempted to invoke the "clear statement" discipline upon federal courts ascertaining, in the relevant texts, a mandate to intervene in State sovereign functions.

In refusing to take up and decide its jurisdiction, the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for exercise of this Court's power of supervision.

2. **Question 2 above stated: whether in suits implicating sovereign State functions the United States occupies a favored status whereby its claim against a State, not arising under the Constitution or any Act of Congress, is unaffected by Case-or-Controversy limitations.**

A citizen's suit in federal court against State implicating sovereign State functions, and not arising from the Constitution or any Act of Congress, is subject to rigorous Case-or-Controversy scrutiny by standards, among others, stated in Questions 3 and 4. Eugene Diamond's appeal to this Court was the same as the present case in purpose and impact, differing only in party status: his was "an attempt by a private individual to compel a State to create and retain the legal framework within which individual enforcement decisions are made," that is, "an effort to compel the State to enact a code in accord with Diamond's interests." This the Court said "is one of the quintessential functions of a State." Diamond's case was dismissed as not satisfying Article III's Case-or-Controversy requirement. *Diamond v. Charles*, 476 U.S. 54, 66, 65 (1986).

Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 99, 106 (1984) considered it "difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law." *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1984) accordingly gave more rigorous scrutiny to an Act of Congress whose claimed effect would alter the "usual constitutional balance between the States and the Federal Government."

"*Atascadero* was an Eleventh Amendment case, but a similar approach is applied in other contexts." *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65 (1989), citing other contexts. Again as recently as June, in *Gregory v. Ashcroft*, ___ U.S. ___, 59 LW 4714 (Jun. 20, 1991), the Court in yet another context prescribed judicial self-discipline against intruding, itself, upon sovereign State functions. "[W]e must be *absolutely certain* that Congress intended such an exercise," said Justice O'Connor writing *Gregory* (e.a.), because as held in *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973), the State has "constitutional responsibility for the establishment and operation of its own government." *Gregory* quoting *Sugarman*, 59 L.W. 4717.

We have shown above, p. 7, that the Complaint's invocation of § 1331 for jurisdiction, ¶ 1, A34, is apparently based upon a false rendition of the Act of Congress that founded Everglades National Park. 16 USC § 410c, misquoted in the Amended Complaint ¶ 28(b), A42.

If federal question § 1331 jurisdiction is invoked instead because the federal common law is thought to govern the Count III and IV contracts with the United States, Court of Appeals opinion A 16, *see also Falls Riverway Realty, Inc. v. City of Niagara Falls*, 754 F.2d 49, 55 fn. 2 (2d Cir. 1985), that would be a subsidiary question well worth this Court's decision. Shall federal judge-made law, responsive to some perceived general necessity, create State obligations to the United States to promulgate and enforce satisfactory State regulatory codemaking? There appears to be no federal common law governing the construction of contracts. *Vernon v. Resolution Trust Corp.*, 907 F.2d 1101, 1109 (11th Cir. 1990). Such law-

applicable would not in any event obviate need for a justiciable Case-or-Controversy.

There is no real claim of right, then, under any law but Florida's, and all four claims implicate and call upon a federal court to perform a sovereign function of the State. The importance of Question # 2 may therefore expressed in terms of the constitutional plan described by the Court in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 410 (1819), which spoke of state and federal governments "each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other."

Do the proprietary interests of the United States make the federal judicial Power "sovereign with respect to the objects committed to the other" sovereign, such that the federal court, without the State's consent to federal court suit, shall perform the State's sovereign codemaking function as claimed redress to the United States?

The Court of Appeals so holding – by its unexamined assertion of jurisdiction – is in conflict with basic constitutional principles established by this Court's decisions.

3. **Question 3 above stated: whether the "clear statement" rule most recently pronounced by *Gregory*, and as previously addressed by *Pennhurst* to State expressions of consent to be sued in federal court, can be met by a State statute that is entirely silent.**

Pennhurst, whose principle was applied in non-Eleventh Amendment contexts by *Will* and *Gregory*, held that any requisite "State's consent be unequivocally

expressed" in a case where consent to federal court suit was required.

The Florida statute is of course entirely silent as to suit against the State in federal court, by the United States or any other litigant.

The Court of Appeals went so far as to acknowledge that the "move" to federal court was proper only if "statutory authority supports federal proceedings," 922 F.2d at 709 fn. 7, A 11 fn. 7, then purposefully refused to examine the statute as required to make that jurisdictional determination.

The Court of Appeals by its purposefully unexamined assertion of jurisdiction rendered a decision so far departing from the usual course of federal judicial proceedings, that this Court's supervisory jurisdiction must be exercised.

4. Question 4 above stated: whether the "clear statement" rule applies also to contracts wherein the State is alleged to have promised a particular exercise of its sovereign codemaking functions.

The "clear statement" rule applies to purported expressions of State consent to suit, to Acts of Congress implicating sovereign State functions, and in a variety of other contexts. They are rehearsed in *Will* and *Gregory*.

Given the implication of sovereign State codemaking functions by the contractual promises alleged by the United States in pleading Counts III and IV, such promises as those, relied upon by the United States as creating

a federal cause of action regardless of the State's withholding of consent to suit, should likewise be subjected to the "clear statement" regimen, in service of the federalism principle as embodied in Article III.

The Court of Appeals by declining to examine its jurisdiction allows these claims to go forward without any such promises having been made by the State. The decision to do so conflicts with settled principles and requires supervisory review by this Court.

CONCLUSION

The Court should issue the Writ for review of all four questions.

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INDEX TO APPENDIX

UNITED STATES of America,
Plaintiff-Appellee,

Florida Keys Citizen Coalition, Florida Wildlife Federation, Environmental Defense Fund, Sierra Club, National Wildlife Federation, Wilderness Society, National Parks & Conservation Association and Defenders of Wildlife, Plaintiffs-Intervenors-Appellees,

Florida Audubon Society, et al.,
Plaintiffs-Intervenors,

v.

SOUTH FLORIDA WATER MANAGEMENT DISTRICT, John R. Woodraska and Florida Department of Environmental Regulation, Defendants-Appellees,

Dale Twachtman, Defendants,

City of Belle Glade,
Defendant-Intervenor,

Western Palm Beach County Farm Bureau, Inc., Florida Fruit and Vegetable Association, Florida Sugar Cane League, Inc., Roth Farms, Inc., K.W.B. Farms and Beardsley Farms, Inc., Movants-Appellants.

UNITED STATES of America,
Plaintiff-Appellee,

v.

SOUTH FLORIDA WATER MANAGEMENT DISTRICT, et al., Defendants,

Western Palm Beach County Farm Bureau, Inc., et al., Appellants.

Nos. 89-6029, 89-6269.

United States Court of Appeals,
Eleventh Circuit.

Jan. 28, 1991.

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Jerry Jackson, Skadden, Arps, Slate, Meagher & Flom, James A. Rogers, James R. Wrathall, Washington, D.C., for South Florida Water Management.

Robert G. Gough, State of Fla., Dept. of Environmental Regulation, Tallahassee, Fla., for State of Fla.

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Stanley James Brainerd, Florida Chamber of Commerce, Tallahassee, Fla., for amicus curiae, Florida Chamber of Commerce.

Robert B. Baker, Jr., Southeastern Legal Foundation, Inc., Atlanta, Ga., for amicus curiae, Southeastern Legal Foundation, Inc.

James T.B. Tripp, Environmental Defense Fund, New York City, for Environmental Defense Fund.

David Crowley, Robert G. Gough, Tallahassee, Fla., for Florida Dept. of Environmental Regulation.

Appeals from the United States District Court for the Southern District of Florida.

Before HATCHETT and ANDERSON, Circuit Judges, and ESCHBACH*, Senior Circuit Judge.

ESCHBACH, Senior Circuit Judge:

This is an appeal by three farm corporations and three agricultural organizations (together, the "Farm Interests") of the District Court's order denying them intervention under Fed.R.Civ.P. 24(a) and (b). The Farm Interests, or their members, rely on the defendant South Florida Water Management District (the "Water District") to provide irrigation and flood control services for their crops. The Farm Interests claim to be proper parties to this suit because the plaintiff United States seeks to restrict the Water District's operations. The United States claims that the Water District releases water polluted with farm runoff and that this pollution is strangling the mosaic of plants and animals that comprise the Loxahatchee National Wildlife Refuge and Everglades National Park. We hold that the Farm Interests have the right to intervene in this case. The right results solely by reason of the issues raised in Count I of the United States'

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* Honorable Jesse E. Eschbach, Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

Amended Complaint,[1] which asks the District Court to translate the state's narrative water quality standards into numeric criteria. The Farm Interests derive no right to intervene, however, by reason of the issues raised in Counts II, III, and IV, which assert that the Water District is violating state permitting requirements and has breached two contracts with the United States. On remand, the District Court may, if it finds appropriate, restrict the Farm Interests' participation in this case to the issues relating to Count I, or may bifurcate the proceedings between Count I and the other counts to promote judicial efficiency.

Jurisdiction

This Court has provisional jurisdiction under the "anomalous rule [that] has evolved in the federal appellate courts concerning the appealability . . . of an order denying intervention." *Weiser v. White*, 505 F.2d 912, 916 (5th Cir. 1975).[2] Under this rule, "[i]f the district court

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[1] The docket sheet for this case indicates that the United States filed a Second Amended Complaint on February 8, 1990, which apparently differs from the Amended Complaint only in stating that the United States has complied with certain notice requirements that apply to Counts I and II. Because the Second Amended Complaint was not included in the record on appeal, we address the Amended Complaint, as the parties did in their briefs.

[2] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), this Court adopted as precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981.

was correct in denying the motion to intervene, this court's jurisdiction evaporates and we must dismiss the appeal for want of jurisdiction. If the district court erred, we retain jurisdiction and must reverse." *Federal Trade Comm'n v. American Legal Distributors*, 890 F.2d 363, 364 (11th Cir. 1989). The rule is "anomalous" because of the "seemingly inconsistent approach of reaching the merits to determine jurisdiction." *Weiser*, 505 F.2d at 917. Not surprisingly, this Court has noted "criticism of this rule, advocating a simple review of the denial of intervention as a final order." *United States v. Jefferson County*, 720 F.2d 1511, 1515 n. 12 (11th Cir. 1983). Under either approach, we proceed to the merits.

Intervention by Right

Under Fed.R.Civ.P. 24(a), a nonparty may intervene by right if:

> the applicant claims an interest in the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

To support intervention, a nonparty's interests must be "direct, substantial, [and] legally protectable." *Chiles v. Thornburgh*, 865 F.2d 1197, 1213 (11th Cir. 1989), *quoting Athens Lumber Co. v. Federal Election Comm'n*, 690 F.2d 1364, 1366 (11th Cir. 1982), *quoting Howse v. S/V "Canada*

Goose 1", 641 F.2d 317, 320-21 (5th Cir. 1981).[3] A nonparty may have a sufficient interest for some issues in a case but not others, and the court may limit intervention accordingly. *See Howard v. McLucas*, 782 F.2d 956, 960-61 (11th Cir. 1986) (restricting intervenors to participation in the single, remedial issue for which they had "standing").[4] Also, the court may order a separate trial of claims or issues subject to intervention when "conducive to expedition and economy." *See* Fed.R.Civ.P. 42(b). In the present case, the main issue is whether and to what extent the Farm Interests have a legally protectable interest at stake. This, in turn, depends on the specific claims that the United States makes in its Amended Complaint.

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[3] The requirement of a direct, substantial, legally protectable interest makes practical sense and reinforces the other criteria under Rule 24(a). A nonparty with an indirect or insubstantial interest by definition has little at stake in the proceedings and so cannot suffer significant harm from the outcome. Further, a nonparty with a tenuous interest in the proceedings will have little incentive to litigate fully, a point that reinforces the Rule's criterion of adequate representation. Similarly, the requirement that the nonparty assert an interest that is legally protectable reinforces the Rule's criterion of impairment of interest. Denial of intervention cannot impair a nonparty's ability to protect its interests if that nonparty would have no legal protection for those interests in any event.

[4] *See also Harris v. Pernsley*, 820 F.2d 592, 599 (3rd Cir.) (stating that an applicant for intervention "may have a sufficient interest to intervene as to certain issues in an action without having an interest in the litigation as a whole"), *cert. den.* 484 U.S. 947, 108 S.Ct. 336, 98 L.Ed.2d 363 (1987); *United States v. American Telephone & Telegraph Co.*, 642 F.2d 1285, 1291

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Count I: Violation of Narrative State Law Standards

In Count I of its Amended Complaint, the United States asks the District Court to translate narrative state water quality standards into numeric limits. Specifically, the United States alleges that the Water District is violating the Florida Surface Water Improvement and Management Act of 1987 (the "SWIM Act"), which provides that the Water District's operations must not "adversely affect indigenous vegetation communities or wildlife." Fla.Stat. § 373.4595(2)(a)(1); *see also* Fla.Admin. Code

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(D.C.Cir. 1980) (discussing with approval the rule that "intervention for individual issues . . . [may be] appropriate to protect particular interests, with the limited nature of the intervenor's interest determining the scope of the intervention that should be allowed"); *Bradley v. Milliken*, 620 F.2d 1141, 1142-3 (6th Cir. 1980) (ordering intervention "for the limited purpose of presenting evidence" on a single issue, but restricting participation on other issues to the extent that the district court would choose to allow the applicants to serve as *amici*); *cf. Southern v. Plumb Tools*, 696 F.2d 1321, 1321-1323 (11th Cir. 1983) (per curiam) (holding that a district court's *failure* to restrict the participation of an intervenor in certain issues at trial was reversible error due to the state evidentiary rules that applied). Restricting intervention to the particular issues for which the proposed intervenor has a sufficient interest accords with standard party practice. Defendants, after all, are often named only for particular counts in multi-party litigation, and their rights to participate in the case extends only to issues relating to the counts for which they are named parties. Defendant-intervenors like the Farm Interests may similarly have an interest only in particular counts, and the scope of their participation in the case should correspond with the scope of that interest.

§ 17-302.560(19) (barring acts that create "an imbalance in natural populations of aquatic flora or fauna").[5] This narrative standard is unspecific about exactly what concentrations of nitrogen and phosphorous – the particular nutrients at issue in this case – are permissible. But as counsel for the United States stated in oral argument, an order setting maximum concentrations of nutrients is the remedy that the United States seeks.[6] If it finds for the United States on Count I and grants the relief requested, the District Court will in effect translate the narrative water quality standards in the SWIM Act into numeric limits.

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[5] In a footnote to its brief, the United States also alleges a violation of the state's antidegradation rule, which prohibits reduction in the water quality of any "Outstanding Florida Waters" below the quality that existed in 1979. *See* Fla.Admin.Code § 17-3.041(1), (8). This antidegradation rule provides, however, that it "shall be implemented through the [state's] permitting process." Fla.Admin.Code § 17.3041(7). The state's alleged failure to enforce its permitting requirements is the subject of Count II of the Amended Complaint, and the antidegradation rule is better seen as an issue relating to that count than to Count I.

[6] In oral argument, the United States stated:

> The reason that . . . [the SWIM Act states] a narrative standard rather than a numerical standard, is because the impact of nutrients is dependant on the ecosystem. We are not seeking in this lawsuit one numerical standard for the State of Florida. *The only thing that we are concerned with in this lawsuit is a numerical standard for the vegetation in the Park and the Refuge,* and I don't believe from the evidence we

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The problem is that the SWIM Act directs the Water District to conduct administrative proceedings toward this same end – translating the Act's narrative standards into specific numeric limits. The Water District has issued a draft "Surface Water Improvement and Management Plan for the Everglades," v. 1 and 2 (August 9, 1989) (the "draft SWIM Plan") which proposes numeric standards for implementing the SWIM Act's requirements, and the Water District is currently working on a final version. The Act delegates specific authority to the Water District to develop the SWIM Plan. *See* Fla.Stat. § 373.451(5) (stating, "The Legislature finds that surface water problems can be corrected . . . through plans and programs . . . that are planned, designed, and implemented by the water management districts"). The broad narrative language of the SWIM Act confirms the grant of administrative discretion to define what the Act's standards mean. *Cf. Chevron v.*

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> have right now that we will be seeking the same numerical standard for the Park and the Refuge.

(emphasis added). In fairness to the District Court, we note that the United States claimed in that forum that it was *not* seeking a numeric standard:

> In regard to the draft SWIM Plan, I believe that this is something in a separate proceeding. . . . *The business of putting a numerical limit on total phosphorous, that is within that separate process,* putting a practical standard . . . on a narrative written standard. That is simply a practical limit. But that is not presently in this litigation. *We are not asking for a number.*

Transcript of Hearing held on November 1, 1989, pp. 30-31 (emphasis added).

Natural Resources Defense Council, 467 U.S. 837, 843-44, 104 S.Ct. 2778, 2781-83, 81 L.Ed.2d 694 (1984) (discussing the implicit grant of administrative discretion in legislative use of broad statutory language). In short, the United States in Count I asks the District Court to partially preempt the administrative development of the SWIM Plan by specifying the numeric standards that apply under the SWIM Act.

The Farm Interests have a legally protectable right under the SWIM Act to participate and comment in the administrative development of the final SWIM Plan, and to pursue an administrative appeal. *See* Fla.Admin.Code § 17-43.035(2) (requiring public hearing in the preparation of the SWIM Act); Fla.Stat. § 373.114 (providing a right to administrative appeal which applies to the final SWIM Plan). Besides being legally protectable, the Farm Interests' right is directly and substantially related to Count I. The right is direct because it is a right to participate in the very matter being decided – what numeric standards should apply under the SWIM Act to the water that the Water District releases. And the right is substantial because it is the Farm Interests' only means of defending their interest in the Water District's services.

The District Court's decision in this case may impair the Farm Interests' ability to protect their right to participate in the administrative proceedings. If the District Court issues an injunction setting numeric water quality limits, that injunction will of course bind the Water District. The Water District could not deviate from the terms of the District Court's order by its own initiative. The District Court's decision could thus erase the Farm Interests' legally protectable right to participate in the

administrative development of the numeric standards that apply under state law.[7]

Absent intervention in this case, some avenues of relief would remain open to the Farm Interests through subsequent litigation, because they cannot be bound to a decision to which they are neither party nor privy. *See In re Birmingham Reverse Discrimination Employment Litigation*, 833 F.2d 1492, 1498 (11th Cir.1987) (holding that one who is not a privy or party to litigation may not, as a matter of due process, be bound by the decision), *affirmed sub nom Martin v. Wilks*, 490 U.S. 755, 109 S.Ct. 2180, 104 L.Ed.2d 835 (1989),[8] In this regard, the Farm Interests

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[7] Viewed from a different angle, Count I of the Complaint seeks to move a state administrative task – development of standards for implementing the broad commands of the SWIM Act – to federal court. If the state is not doing its job and statutory authority supports federal proceedings, this move is legally proper. The problem is that various groups have the right to participate in the decision in the administrative forum. If their rights of participation are not to be lost, the administrative participants must receive a corresponding right to participate in the judicial proceedings. So too, the federal court needs to hear what these administrative participants have to say so that it can make an informed decision.

[8] In his dissent to the Eleventh Circuit's opinion, Judge Anderson "agree[d] with the . . . court that the[] plaintiffs were not parties to the prior litigation which resulted in the consent decree [at issue], and . . . [were] not bound by the consent decree and should be free on remand to . . . test its validity." 833 F.2d at 1503. He concluded, however, that certain practical consequences could still follow from the consent decree – specifically that a party to the decree could rely on it and use compliance with its terms as evidence of nondiscriminatory

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would remain free to challenge the final SWIM Plan in state court. *See Fla.Stat.* § 120.68 (providing for judicial review of final administrative action in state courts). Even so, a subsequent court would likely be reluctant, as a practical matter, to issue a decision that conflicts with the District Court's order in the present case. This reluctance may entail something more than the usual respect for prior decisions under the doctrine of *stare decisis*. The effect of the District Court's decision on subsequent courts thus provides a further basis for concluding that the Farm Interests' have shown a potential impairment of their rights sufficient to establish intervention. *See Chiles v. Thornburgh*, 865 F.2d 1197, 1214 (11th Cir.1989) (stating that the potential *stare decisis* effect of a judgment may, by itself, support intervention). In short, the Farm Interests have a direct, substantial, legally protectable interest in Count I, and this case may impair their ability to defend that interest.

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intent in the subsequent suit by the nonparties. *Id.*, at 1502. The Supreme Court's affirmance did not take any position on this issue. *See* 490 U.S. 761, 109 S.Ct. at 2184 n. 1.

As Judge Anderson suggested in oral argument in the present case, the Water District can protect itself against the risk of multiple lawsuits by using Fed.R.Civ.P. 19 and 23 to join necessary parties or to certify a defendant class for any issues (in particular, those raised in Count I) where this risk is present. "The parties to a lawsuit presumably know better than anyone else the nature and the scope of the relief sought in the action. . . . It makes sense therefore to place on them a burden of bringing in additional parties where such a step is indicated." *Id.*, 490 U.S. at 765, 109 S.Ct. at 2186.

The final question is whether the Farm Interests' are adequately represented by the Water District. The Farm Interests' position is at odds with that of the Water District in key respects. For example, the draft SWIM Plan that the Water District has issued specifies a phosphorous concentration of 0.03 ppm for water released to the Everglades system. *See* Draft Swim Plan v. II, p. 117. The Farm Interests do not accept this figure, and point to the statement by the Water District before the District Court that even a less restrictive standard of 0.05 ppm of phosphorous would entail "draconian consequences" for the farms using the water. Transcript of Hearing held on March 7, 1989, p. 11. In these circumstances, the Farm Interests should not be required to rely on the Water District to represent them. *See Chiles v. Thornburgh*, 865 F.2d 1197, 1214 (11th Cir.1989) (holding that the "possibility" that a party would not sufficiently "emphasize" the position of intervenors meant that adequate representation was not present).

In sum, the Farm Interests have a direct, substantial, legally protectable interest in participating in the development of numeric water quality standards under state law. Their ability to protect this interest will be impaired if the District Court issues an injunction specifying numeric standards for the Water District because that injunction will bind the Water District in its administrative proceedings, and will have at least a *stare decisis* effect in subsequent litigation. Finally, the Water District may not adequately represent the Farm Interests because the two differ on the numeric standard that applies. The Farm Interests thus meet the criteria for intervention by right by reason of the issues raised in Count I. On

remand, the District Court may choose to condition their intervention in this case on such terms as will be consistent with the fair, prompt conduct of this litigation.[9]

Counts II, III, and IV:

Failure to Obtain State Permits and Breach of Contract

In Count II of its Amended Complaint, the United States contends that the Water District has violated Florida law by operating pumps, water control structures, and canals without required permits. In Counts III and IV, the United States contends that the Water District has breached a February 10, 1984 contract between it and the Army Corps of Engineers, and a June 8, 1951 contract between it and the United States. Again, the initial question is whether the Farm Interests have a legally protectable interest in the United States' contentions. Because

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[9] "An intervention of right . . . may be subject to appropriate conditions or restrictions responsive among other things to the requirements of efficient conduct of proceedings." Fed. R.Civ.P. 24(a) advisory committee's notes to 1966 amendments. To mention a few options, the District Court may find it appropriate to (1) allow the other parties to produce documents in a single set for the Farm Interests to share and copy among themselves, (2) require the organizational Farm Interests to respond to interrogatories regarding each of their members who claims an interest in the proceedings, and/or (3) limit the Farm Interests to a few or a single counsel. On this last option, see, for example, *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 526 and n.2 (9th Cir.1983) (stating, "Throughout these proceedings intervenors have . . . spoken with one voice. Nothing in this opinion should be interpreted as approving participation by the intervenors on any other basis").

their interests are not legally protectable, the Farm Interests derive no right to intervene by reason of the issues raised in these counts.

The Farm Interests have asserted *no* property or other legal right in the Water District's services directly. Instead the Farm Interests say that their economic interests depend on those services. This is not enough.

> "By requiring that the applicant's interest be . . . 'legally protectable,' it is plain that something more than an economic interest is necessary. What is required is that the interest be one which the *substantive* law recognizes as belonging to or being owned by the applicant."

New Orleans Public Service, Inc. v. United Gas Pipe Line Co., 732 F.2d 452, 464 (5th Cir.) (en banc) (emphasis original), *cert. denied*, 469 U.S. 1019, 105 S.Ct. 434, 83 L.Ed.2d 360 (1984); *see Getty Oil Co. v. Department of Energy*, 865 F.2d 270, 276 (Temp.Em.Ct.App.1988) (stating, "An economic interest . . . alone is insufficient to warrant intervention") (citation omitted). This does not mean that the Farm Interests' economic livelihood in unimportant. It only means that the Farm Interests must show that the present proceedings threaten some substantive legal protection for their livelihood to support intervention by right.

A comparison may help make this point clear. The Farm Interests have referred the Court to the Eighth Circuit's decision in *Ford Motor Co. v. Bisanz Bros., Inc.*, 249 F.2d 22 (8th Cir.1957). In *Ford*, the court of appeals held that Ford Motor Company could intervene by right in a nuisance action by a neighboring landowner against the railroad that served the Ford factor. We believe that *Ford* was rightly decided because, although Ford did not

own the railroad, the railroad apparently could not have suspended service to Ford without an order from the Interstate Commerce Commission, after notice to Ford and a hearing in which Ford would have had the right to participate. *Id.*, at 23, 24. Thus, Ford claimed a "*right* to have the railroad furnish service" and the railroad had "the *obligation*" to provide those services. *Id.*, at 28 (emphasis added). If, on the other hand, the railroad had been free to suspend its service, Ford would have had no legally protectable interest at stake, no matter how much Ford's economic interests may have depended on that service. The holding in *Ford* thus supports the rule that a legal interest in the proceedings is necessary to support intervention.

Again, the Farm Interests have not asserted any legal right in the Water District's services – however much their economic interests may depend on those services. Nor have the Farm interests claimed any right to participate in the state's decision on the permit requirements that apply to the Water District, which is the subject of Count II, or any right as a third-party beneficiary under the 1984 contract, which is the subject of Count III. The Farm Interests do make a passing claim to being third-party beneficiaries under the 1951 contract in Count IV, but this is baseless. The 1951 contract is governed by federal law, which allows identifiable third parties to assert direct obligations to them under a contract. *See, e.g., Berberich v. United States*, 5 Cl.Ct. 652, 655-56 (1984), *aff'd without opinion*, 770 F.2d 179 (Fed.Cir.1985). The Farm Interests fail to point to any specific language in the 1951 contract that confers rights on them. Instead they simply rely on the contract's broad purposes of flood control and

environmental protection to support their claim. These purposes extend to the Farm Interests, but they also extend to nearly everyone else in central and southern Florida. The Farm Interests are not third-party beneficiaries of the 1951 contract.

In short, the Farm Interests have no legally protectable interest at stake in the issues raised in Counts II, III, or IV of the Amended Complaint. With no legally protectable interest, the Farm Interests derive no right to intervene from the issues raised in these counts.[10] As discussed above, the District Court may prevent delay in the resolution of these counts by placing appropriate conditions on the Farm Interests' intervention in this case, or by ordering separate trial and discovery of one or more of these counts.[11]

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[10] There is some dispute as to whether the United States has a fifth count for common law nuisance lurking in its Amended Complaint. The United States contends that the "delivery of nutrient-loaded waters [by the Water District] constitutes a nuisance under Florida law" and asks for an injunction to "abate the nuisance." Amended Complaint, ¶¶48, 68. The United States clarified in oral argument, however, that it is referring to Fla.Stat. § 373.433, which declares acts in violation of the state's permit and water quality requirements to be a statutory nuisance. The nuisance claim, then, does not add a substantive count to the United States' other claims arising under state law.

[11] We note that the 1984 contract that is the subject of Count III may be particularly appropriate for separate trial and discovery because it already lists numeric water quality standards for phosphorous, nitrogen, and other constituents. For this reason, the determination of whether the Water District has breached this contract may be straightforward. A separate

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Permissive Intervention

The Farm Interests also ask this Court to review the District Court's denial of permissive intervention under Fed.R. Civ.P. 24(b). We review for abuse of discretion. *See Chiles v. Thornburgh*, 865 F.2d 1197, 1215 (11th Cir.1989). The District Court concluded that permissive intervention would "delay and prejudice the rights of the original parties" and "make this case even more unmanageable than it already appears to be" by adding witnesses and collateral issues. District Court's Order on Motions to Intervene and Rule 19 Joinder, p. 9. We find no abuse of discretion in this decision. In a similar context, Judge Tuttle recently wrote for this Court:

> intervention [in this case] . . . would severely protract the litigation. Although we express no opinion as to the merits of plaintiff's claims, *an action which seeks to preserve the environment from further deterioration deserves refuge from . . . undue delay.*

Manasota-88, Inc. v. Tidwell, 896 F.2d 1318, 1323 (11th Cir.1990) (emphasis added). In the present case, the District Court is correct to use its full discretionary powers – including its discretion to deny permissive intervention – to prevent delay that may lead to further deterioration of the Everglades.

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trial and discovery on this count may thus allow the District Court to provide prompt, initial relief, if it turns out that the United States can prove its allegations.

Conclusion

The Farm Interests meet the criteria for intervention by right by reason of the issues raised in Count I of the Amended Complaint. The order denying intervention is reversed and the case is remanded to the District Court to allow intervention subject to such conditions as the District Court finds appropriate consistent with this opinion.

Reversed and Remanded.

HATCHETT, Circuit Judge, dissenting in part:

I dissent from that portion of the majority opinion which allows the Farm Interests to intervene as a matter of right. The majority's reversal of the district court on Count I is for two reasons: (1) "the district court's decision in this case may impair the Farm Interest ability to protect their right to participate in the administrative proceedings. If the district court issues an injunction setting numeric water quality limits, that injunction will of course bind the water district"; the (2) "viewed from a different angle, Count I of the complaint seeks to move a state administrative task – development of standards for implementing broad commands of the SWIM Act – to federal court."

The majority's reliance on these two reasons indicates that intervention of right is being provided to the Farm Interest because the majority has imagined "horribles." The majority recognizes that Count I of the complaint seeks to move a state administrative task to federal court, but concludes that an experienced district court judge does not or will not recognize the shift from Florida administrative proceedings to federal court litigation. At

this early stage of the proceedings, I would affirm the district court and allow it to continue sharpening the issues mindful of the affect a numeric level determination would have on the Farm Interests' administrative remedies. Surely, if the time arises where the Farm Interests' remedies will be affected, the district court will take steps to protect those interests.

Of course, we must not forget that the courts of Florida, the courts of the United States, and Florida's administrative agencies, are open and capable of addressing issues framed by the Farm Interests.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 89-6029

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

FLORIDA KEYS CITIZEN COALITION, FLORIDA WILDLIFE FEDERATION, ENVIRONMENTAL DEFENSE FUND, SIERRA CLUB, NATIONAL WILDLIFE FEDERATION. WILDERNESS SOCIETY, NATIONAL PARKS & CONSERVATION ASSOCIATION and DEFENDERS OF WILDLIFE,

Plaintiffs-Intervenors-Appellees,

FLORIDA AUDUBON SOCIETY, ET AL,

Plaintiffs-Intervenors,

versus

SOUTH FLORIDA WATER MANAGEMENT DISTRICT, JOHN R. WOODRASKA and FLORIDA DEPARTMENT OF ENVIRONMENTAL REGULATION,

Defendants-Appellees,

DALE TWACHTMAN,

Defendant,

CITY OF BELLE GLADE,

Defendant-Intervenor,

WESTERN PALM BEACH COUNTY FARM BUREAU, INC., FLORIDA FRUIT AND VEGETABLE ASSOCIATION, FLORIDA SUGAR CANE LEAGUE, INC., ROTH FARMS, INC., K.W.B. FARMS and BEARDSLEY FARMS, INC.,

Movants-Appellants.

No. 89-6269

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

FLORIDA KEYS CITIZEN COALITION, ET AL,

Plaintiffs-Intervenors,

NATIONAL WILDLIFE FEDERATION,

Plaintiff-Intervenor-Appellee,

versus

SOUTH FLORIDA WATER MANAGEMENT DISTRICT, JOHN R. WOODRASKA and FLORIDA DEPARTMENT OF ENVIRONMENTAL REGULATION,

Defendants-Appellees,

DALE TWACHTMAN,

Defendant,

CITY OF BELLE GLADE,

Defendant-Intervenor,

WESTERN PALM BEACH COUNTY FARM BUREAU, INC., FLORIDA FRUIT AND VEGETABLE ASSOCIATION, FLORIDA SUGAR CANE LEAGUE, INC., ROTH FARMS, INC., K.W.B. FARMS and BEARDSLEY FARMS, INC.,

Movants-Appellants.

On Appeal from the United States District Court for the Southern District of Florida

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FILED MAR - 6 1991

ORDER:

The Sugar Cane Growers Cooperative of Florida's motion for leave to appear as amicus curiae to suggest lack of jurisdiction in this and the district court for want of a justiciable case or controversy is DENIED.

Appellant's Western Palm Beach County Farm Bureau, Inc motion to strike appellee United States' petition for rehearing is DENIED.

Appellants' Western Palm Beach County Farm Bureau, Inc. alternative suggestion that an answer to the United States' petition for rehearing be allowed is GRANTED. Appellants may file a reply to the United States' petition for rehearing within 7 days from the date of this order.

/s/ JOSEPH W. HATCHETT
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 89-6029 and 89-6269

UNITED STATES of America, et al,

Plaintiffs-Appellees

versus

SOUTH FLORIDA WATER MANAGEMENT DISTRICT., et al

Defendants-Appellees

WESTERN PALM BEACH COUNTY FARM BUREAU, Inc., et al

Movants-Appellants

Appeal from the United States District Court
for the Southern District of Florida

FILED MAR 22 1991

BEFORE: HATCHETT and ANDERSON, Circuit Judges, and ESCHBACH*, Senior Circuit Judge.

ORDER:

The three farm corporations and three agricultural organizations that have intervened in this case (together, the "Farm Interests") have filed a "Suggestion and Motion as to Lack of Jurisdiction." We decline to consider this motion. As we held in our opinion in the underlying appeal, the Farm Interests may intervene in this case to

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* Honorable Jesse E. Eschbach, Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

protect their right to participate in the development of numeric limits implementing the state's narrative water quality standards. The jurisdictional issues that the Farm Interests raise in their motion are only indirectly related to the protection of this right. Further, the Farm Interests are adequately represented on the jurisdictional issues by the defendants South Florida Water District and Florida Department of Environmental Regulation, which have already raised many of these issues with the District Court. Finally, even if the Farm Interests were proper parties to raise the jurisdictional issues in their motion, it would be procedurally inappropriate for us to extend our limited appellate review under the anomolous rule to decide issues not raised in the parties' briefs or in this Court's published opinion.

The Farm Interests may still seek to present their jurisdictional motion to the District Court. If they choose this step, they will be well advised to ask the District Court's permission first. As we have stated, the District Court may condition the Farm Interests' intervention in this case on such terms as will be consistent with the fair, prompt conduct of this litigation. This authority allows the District Court to dispose in summary fashion (as we have done here) of any motions that the Farm Interests may file beyond the scope of their right to participate in these proceedings.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 89-6029 and 89-6269

UNITED STATES of America, et al,

Plaintiffs-Appellees

versus

SOUTH FLORIDA WATER MANAGEMENT DISTRICT., et al

Defendants-Appellees

WESTERN PALM BEACH COUNTY FARM BUREAU, Inc., et al

Movants-Appellants

Appeal from the United States District Court
for the Southern District of Florida

FILED APR – 5 1991

Before HATCHETT and ANDERSON, *Circuit Judges*, and ESCHBACH*, *Senior Circuit Judge*.

ORDER:

The three farm corporations and three agricultural organizations that have intervened in this case (together, the "Farm Interests") have filed a "Motion to Certify Pending, Important Question of Florida Law to the Supreme Court of Florida" (the "Certification Motion"). In the Certification Motion, the Farm Interests state that

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* Honorable Jesse E. Eschbach, Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

their purpose is to aid the Court in its resolution of the "Suggestion and Motion as to Lack of Jurisdiction" that the Farm Interests previously filed. In light of our Order of March 22, 1991 declining to consider the "Suggestion and Motion as to Lack of Jurisdiction," we deny the Certification Motion as moot.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 89-6029

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

FLORIDA KEYS CITIZEN COALITION, FLORIDA WILDLIFE FEDERATION, ENVIRONMENTAL DEFENSE FUND, SIERRA CLUB, NATIONAL WILDLIFE FEDERATION, WILDERNESS SOCIETY, NATIONAL PARKS & CONSERVATION ASSOCIATION and DEFENDERS OF WILDLIFE,

Plaintiffs-Intervenors-Appellees,

FLORIDA AUDUBON SOCIETY, ET AL.,

Plaintiffs-Intervenors,

versus

SOUTH FLORIDA WATER MANAGEMENT DISTRICT, JOHN R. WOODRASKA and FLORIDA DEPARTMENT OF ENVIRONMENTAL REGULATION,

Defendants-Appellees,

DALE TWACHTMAN,

Defendant,

CITY OF BELLE GLADE,

Defendant-Intervenor,

WESTERN PALM BEACH COUNTY FARM BUREAU, INC., FLORIDA FRUIT AND VEGETABLE ASSOCIATION, FLORIDA SUGAR CANE LEAGUE, INC., ROTH FARMS, INC., K.W.B. FARMS and BEARDSLEY FARMS, INC.,

Defendants-Appellants.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 89-6269

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

FLORIDA KEYS CITIZEN COALITION, ET AL.,

Plaintiffs-Intervenors,

ENVIRONMENTAL DEFENSE FUND,
NATIONAL WILDLIFE FEDERAL,

Plaintiffs-Intervenors-Appellees,

versus

SOUTH FLORIDA WATER
MANAGEMENT DISTRICT, JOHN R.
WOODRASKA and FLORIDA
DEPARTMENT OF ENVIRONMENTAL
REGULATION,

Defendants-Appellees,

DALE TWACHTMAN,

Defendant,

CITY OF BELLE GLADE,

Defendant-Intervenor,

WESTERN PALM BEACH COUNTY
FARM BUREAU, INC., FLORIDA FRUIT
AND VEGETABLE ASSOCIATION,
FLORIDA SUGAR CANE LEAGUE, INC.,
ROTH FARMS, INC., K.W.B. FARMS and
BEARDSLEY FARMS, INC.,

Movants-Appellants.

Appeal from the United States District Court
for the Southern District of Florida

FILED MAY - 7 1991

ON PETITION(S) FOR REHEARING

BEFORE: HATCHETT and ANDERSON, Circuit Judges, and ESCHBACH*, Senior Circuit Judge.

PER CURIAM:

The petitions for rehearing filed by the United States of America and appellants Farm Interests are denied.

ENTERED FOR THE COURT:

/s/ Joseph W. Hatchett
United States Circuit Judge

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* Honorable Jesse E. Eschbach, Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

FLORIDA STATUTES 1989

403.412 Environmental Protection Act.–

(1) This section shall be known and may be cited as the "Environmental Protection Act of 1971."

(2)(a) The Department of Legal Affairs, any political subdivision or municipality of the state, or a citizen of the state may maintain an action for injunctive relief against:

1. Any governmental agency or authority charged by law with the duty of enforcing laws, rules, and regulations for the protection of the air, water, and other natural resources of the state to compel such governmental authority to enforce such laws, rules, and regulations;

2. Any person, natural or corporate, or governmental agency or authority to enjoin such persons, agencies, or authorities from violating any laws, rules, or regulations for the protection of the air, water, and other natural resources of the state.

(b) In any suit under paragraph (a), the Department of Legal Affairs may intervene to represent the interests of the state.

(c) As a condition precedent to the institution of an action pursuant to paragraph (a), the complaining party shall first file with the governmental agencies or authorities charged by law with the duty of regulating or prohibiting the act or conduct complained of a verified complaint setting forth the facts upon which the complaint is based and the manner in which the complaining party is affected. Upon receipt of a complaint, the governmental agency or authority shall forthwith transmit, by registered or certified mail, a copy of such complaint to

those parties charged with violating the laws, rules, and regulations for the protection of the air, water, and other natural resources of the state. The agency receiving such complaint shall have 30 days after the receipt thereof within which to take appropriate action. If such action is not taken within the time prescribed, the complaining party may institute the judicial proceedings authorized in paragraph (a). However, failure to comply with this subsection shall not bar an action for a temporary restraining order to prevent immediate and irreparable harm from the conduct or activity complained of.

(d) In any action instituted pursuant to paragraph (a), the court, in the interest of justice, may add as party defendant any governmental agency or authority charged with the duty of enforcing the applicable laws, rules, and regulations for the protection of the air, water, and other natural resources of the state.

(e) No action pursuant to this section may be maintained if the person (natural or corporate) or governmental agency or authority charged with pollution, impairment, or destruction of the air, water, or other natural resources of the state is acting or conducting operations pursuant to currently valid permit or certificate covering such operations, issued by the appropriate governmental authorities or agencies, and is complying with the requirements of said permits or certificates.

(f) In any action instituted pursuant to this section, other than an action involving a state NPDES permit authorized under s. 403.0885, the prevailing party or parties shall be entitled to costs and attorney's fees. Any award of attorney's fees in an action involving such a

state NPDES permit shall be discretionary with the court. If the court has reasonable ground to doubt the solvency of the plaintiff or the plaintiff's ability to pay any cost or judgment which might be rendered against him in an action brought under this section, the court may order the plaintiff to post a good and sufficient surety bond or cash.

(3) The court may grant injunctive relief and impose conditions on the defendant which are consistent with and in accordance with law and any rules or regulations adopted by any state or local governmental agency which is charged to protect the air, water, and other natural resources of the state from pollution, impairment, or destruction.

(4) The doctrines of res judicata and collateral estoppel shall apply. The court shall make such orders as necessary to avoid multiplicity of actions.

(5) In any administrative, licensing, or other proceedings authorized by law for the protection of the air, water, or other natural resources of the state from pollution, impairment, or destruction, the Department of Legal Affairs, a political subdivision or municipality of the state, or a citizen of the state shall have standing to intervene as a party on the filing of a verified pleading asserting that the activity, conduct, or product to be licensed or permitted has or will have the effect of impairing, polluting, or otherwise injuring the air, water, or other natural resources of the state.

(6) Venue of any causes brought under this law shall lie in the county or counties wherein the cause of action is alleged to have occurred.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA,
Plaintiff,

CASE NO. 88-1886-CIV-HOEVELER

v.

SOUTH FLORIDA WATER MANAGEMENT DISTRICT; JOHN R. WODRASKA, Executive Director, South Florida Water Management District; FLORIDA DEPARTMENT OF ENVIRONMENTAL REGULATION; and DALE TWACHTMANN, Secretary, Florida Department of Environmental Regulation,

Defendants.
_____/

AMENDED COMPLAINT

Plaintiff, United States of America, sues Defendants, South Florida Water Management District, John R. Wodraska, Executive Director of South Florida Water Management District, Florida Department of Environmental Regulation, and Dale Twachtmann, Secretary of Florida Department of Environmental Regulation, and says as follows:

JURISDICTION AND VENUE

1. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1345.

2. Venue is proper in the Southern District of Florida pursuant to 28 U.S.C. § 1391(b) because the property

in question is located within the Southern District of Florida and the defendants can be found within the District.

PARTIES

3. Plaintiff, United States, owns the following property within the State of Florida:

(a). Everglades National Park, located in Dade, Monroe, and Collier Counties, which consists of approximately 1.4 million acres held in fee; and

(b). Arthur R. Marshall Loxahatchee National Wildlife Refuge, located in Palm Beach County, which consists of approximately 2,500 acres held in fee and 143,000 acres held under a long term cooperative agreement signed on June 8, 1951, entitled "Cooperative and License Agreement between the Central and Southern Florida Flood Control District and the United States of America."

4. Both Everglades National Park ("Everglades" or "Park") and Arthur R. Marshall Loxahatchee National Wildlife Refuge ("Loxahatchee") constitute natural resources of the highest order and have been recognized as such by the United States Congress and the Florida Legislature.

5. Everglades National Park is made up of wet prairies, aquatic sloughs, sawgrass prairies, hammock islands, pinelands, and estuarine systems. In addition to its status as a National Park, it has been designated an International Biosphere Reserve and World Heritage Site, Federal Wilderness Area, and Wetland of International

Significance. As such it provides sanctuary to rare, threatened, and endangered species of wildlife including the Florida Panther, Southern Bald Eagle, Woodstork, American Crocodile, and Cape Sable Sparrow. The Park has diverse and complex ecosystems that require non-polluted, low nutrient waters for their ecological integrity because of the native flora and fauna developed under these circumstances.

6. Arthur R. Marshall Loxahatchee National Wildlife Refuge is a remnant of the original northern Everglades and has the same diversity of marsh habitat. Like the Park, it is a sanctuary to unique wildlife species and is designated as critical habitat for the endangered Snail Kite. Low nutrient waters are also required in Loxahatchee to preserve its native habitat.

7. Both Everglades National Park and Loxahatchee National Wildlife Refuge are designated outstanding Florida Waters under Florida law and lowering their ambient water quality is prohibited. Together these two natural resources contain habitat for 26 threatened or endangered species.

8. Defendant, Department of Environmental Regulation ("DER"), is the State agency vested with significant power and responsibility to control the waters of Florida and prevent pollution. The DER's powers and duties under Fla. Stat. 403 include: establishing water quality standards for the state, administering a permit system required for any structure that may be a source of water pollution, and enforcement of the statute by administrative and civil actions to compel compliance with permit

conditions. Under Fla. Stat. 373.026, DER is given additional powers such as supervisory authority over water management districts.

9. Defendant, Dale Twachtmann, is Secretary of the Florida Department of Environmental Regulation. All references herein to "DER" shall include Defendant, Dale Twachtmann, as Secretary of DER as well as DER itself as an agency.

10. Defendant, South Florida Water Management District ("SFWMD"), is delegated significant power and responsibility by DER to manage and protect the State's water resources within the geographical portion of Florida relevant to this lawsuit. SFWMD has certain responsibilities in managing and protecting water resources directly stemming from legislative mandate. In addition, SFWMD itself owns and operates various stationary installations.

11. Defendant, John R. Wodraska, is the Executive Director of the South Florida Water Management District. All references herein to "SFWMD" shall include Defendant, John W. Wodraska, as Executive Director of the South Florida Water Management District as well as SFWMD itself.

STATEMENT OF THE CASE

12. SFWMD manages more than one hundred water control structures and some 1,400 miles of canals and levees as part of its water management responsibilities. These structures and canals must be operated in accordance with the State's laws and regulations. This water

system artificially transports water throughout the Kissimmee/Okeechobee/Everglades basin. Vast quantities of water are delivered to Loxahatchee National Wildlife Refuge and Everglades National Park.

13. One of the largest consumers of water south of Lake Okeechobee ("Lake") is the agri-industry located within a 700,000 acre basin called the Everglades Agricultural Area ("EAA"). The EAA lies south of Lake Okeechobee between the Lake and the Water Conservation Areas. See Exhibit A.

14. Within the EAA, SFWMD uses its pumps and canals to drain the basin during the wet season and irrigate crops during the dry season. SFWMD sends tons of pollutants southward to the detriment of downstream landowners including Everglades and Loxahatchee.

15. The end result of this water management scheme is that large quantities of polluted water have resulted in the destruction of lower forms of aquatic life essential to the preservation of the sensitive ecosystems in Loxahatchee, including but not limited to:

(a) Loss of natural periphyton mat;

(b) Change from a diverse vegetative community to a monoculture of cattails; and

(c) Loss of dissolved oxygen.

16. Nutrient induced destruction of the periphyton mat directly and adversely impacts all higher forms of biological life including the fish and aquatic birds which inhabit the Park and Loxahatchee.

17. Florida law recognizes that excessive nutrients (total nitrogen and total phosphorus) constitute one of

the most severe water quality problems facing the State. In addition, the Florida Administrative Code requires that particular consideration be given to protection from nutrient pollution in those waters containing very low nutrient concentrations. Natural waters of Everglades and Loxahatchee fall within this category.

18. DER and SFWMD have the duty under Florida law to regulate the quality of these waters in order to reduce the nutrient and pollution load. They have breached that duty.

19. Further, SFWMD has entered into a contract with Everglades National Park which promises the Park that certain water quality criteria will be met, and that SFWMD will use appropriate action including legal process to assure that water quality criteria will be enforced. A copy of that contract is attached. See Exhibit B. SFWMD has breached that contract.

20. SFWMD has also entered a contract with the United States of America for the use of Conservation Area I as a wildlife refuge. The contract provides that the refuge shall be used in a manner consistent with wildlife management. The nutrient induced destruction of habitat is inconsistent with this purpose and therefore constitutes a breach of the contract. See Exhibit C.

21. DER and SFWMD have knowingly failed to enforce State laws enacted to regulate and protect water quality while agri-industry acreage and production within the EAA and elsewhere surrounding Lake Okeechobee expanded. The result of this regulatory failure has been a dangerous increase in the amount of nutrient pollution in the water conveyance system.

22. Until 1979, a large portion of the polluted water coming off the Everglades Agricultural Area was back-pumped into Lake Okeechobee by SFWMD. These waters contained extremely high levels of pollutants such as phosphorus and nitrogen. Nutrients and other pollutants have been recognized by DER and SFWMD as causing or contributing to serious degradation of water quality in Lake Okeechobee.

23. In 1979, SFWMD and DER began diverting significant amounts of these polluted waters, south toward the Water Conservation Areas and Everglades National Park. The Water Conservation Areas lie between the EAA and Everglades National Park.

24. Loxahatchee Wildlife Refuge is almost entirely contained within Water Conservation Area 1. Water Conservation Areas 2A and 2B lie to the southwest of number 1. Water Conservation Areas 3A and 3B lie immediately north of and adjacent to Everglades National Park. The Conservation Areas are made up of historic Everglades marsh which depend on pristine, almost nutrient-free water. As a result of the management strategy adopted in 1979, increased amounts of polluted waters flow southward through the Water Conservation Areas into Everglades National Park.

25. The diversion of polluted water has caused or contributed to violations of state water quality standards in Loxahatchee. In Loxahatchee and the other Water Conservation Areas this pollution has already caused tens of thousands of acres of irreversible vegetative changes to the delicate and diverse marsh habitats. Cattails have invaded and taken over sawgrass stands, wet prairies,

and slough communities. A monoculture of cattails depletes dissolved oxygen so that native fish and wildlife habitats are lost.

26. These polluted waters are creating an expanding nutrient front that has invaded Loxahatchee and the other Water Conservation Areas. Further, increased nutrient levels have been documented in the waters and soils of Everglades National Park.

27. The extensive damage to the native vegetation which has already occurred in Loxahatchee Wildlife Refuge and the Water Conservation Areas constitutes clear and convincing evidence of the current danger to Everglades National Park. Unless immediate measures are taken to prevent excessive nutrients and contaminants from being dumped downstream into Everglades National Park, the damage which is occurring in Loxahatchee and the Water Conservation Areas will also occur in the Park.

28. Such damage threatens to undermine the very purposes for which these areas were established. Congress has repeatedly affirmed that National Parks must be protected from ecological damage and remain unimpaired for the enjoyment of future generations. Numerous Acts of Congress have been directed at preserving and protecting intact the sensitive ecological balance in Everglades National Park. Specifically:

(a) National Park Service Organic Act (16 U.S.C. § 1), August 25, 1916, whose stated "purpose is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by

such means as will leave them unimpaired for the enjoyment of future generations."

(b) Everglades National Park Authorization Act (16 U.S.C. § 410c), May 30, 1934, which states that Everglades National Park area shall "be permanently reserved as a wilderness and no development of the project or plan . . . shall be undertaken which will interfere with preservation intact of the unique flora and fauna and the essential primitive natural conditions now prevailing in this area."

(c) Wilderness Act (16 U.S.C. § 1131(a)), September 3, 1964, which sets forth Congressional intent as it relates to wilderness management and protection, specifically, " . . . there is hereby established a National Wilderness Preservation System to be composed of federally owned areas designated by Congress as 'wilderness areas', and these shall be administered for the use and enjoyment of the American people in such manner as will leave them unimpaired for future use and enjoyment as wilderness. . . . "

By Act of Congress, November 10, 1978, 16 U.S.C. § 1132, 1.3 million acres of Everglades National Park was declared wilderness, to be administered pursuant to the Wilderness Act of 1964.

COUNT I

DER AND SFWMD HAVE VIOLATED STATE LAW BY FAILING TO REGULATE WATER POLLUTION

29. Plaintiff realleges paragraphs 1 through 28 above.

30. Defendant, Department of Environmental Regulation, is the Florida agency vested under Florida Stat. 373 with the power and responsibility to conserve, protect, manage, and control the waters of Florida. DER is further responsible for administration of the provisions of Fla. Stat. 373 otherwise known as the Florida Water Resources Act of 1972 ("Chapter 373").

31. Pursuant to Chapter 373, DER may delegate its powers to the governing board of a water management district such as the South Florida Water Management District. For example, the power to issue consumptive use permits is delegated to SFWMD.

32. Under the Florida Surface Water Improvement and Management Act of 1987, Fla. Stat. 373.4595(2)(a)1., SFWMD shall not divert waters to Everglades National Park in such a way that:

(a) State water quality standards are violated; or

(b) The nutrients in diverted waters adversely affect native vegetative communities or wildlife.

33. Vegetative changes caused by nutrient polluted waters delivered by SFWMD have occurred in Conservation Area 3A, immediately north of and adjacent to Everglades National Park. If the excess nutrient pollution continues, the same vegetative changes will occur in the Park. Increased nutrient levels have already been documented in the Park.

34. DER has the power and duty to control and prohibit pollution of water under Fla. Stat. 403, otherwise known as the Florida Air and Water Pollution Control Act

("Chapter 403"). That Act declares that the public policy of Florida is to conserve the waters of the State and to protect, maintain, and improve the quality thereof for public water supplies, for the propagation of wildlife, fish, and other beneficial uses. It also prohibits the discharge of wastes into Florida waters without treatment necessary to protect those beneficial uses of the water.

35. Pursuant to the provisions of Chapter 403, DER has designated both Everglades and Loxahatchee as Outstanding Florida Waters. Accordingly, they are afforded the highest protection because of their exceptional ecological significance.

36. Both DER and SFWMD have the power and responsibility to issue and enforce various permits for protection and management of water. The purpose of these permits is to ensure that the waters within the State are protected in accordance with State regulation.

37. Both DER and SFWMD have failed to exercise their power and failed to fulfill their respective responsibilities under Chapter 373 and Chapter 403, including but not limited to, the following ways:

(a) They have failed to regulate polluted waters from the Everglades Agricultural Area and elsewhere surrounding the Lake that contain harmful nutrients and other contaminants, including, *inter alia*, nitrogen, phosphorus, herbicides;

(b) They have failed to prevent violation of state water quality standards for waters entering Loxahatchee, and Everglades National Park;

(c) They have failed to halt movement of the expanding nutrient front that threatens the ecological integrity of Everglades National Park;

(d) They have allowed the ambient water quality of Everglades National Park and Loxahatchee National Wildlife Refuge to be lowered beyond the quality that existed when they were designated as Outstanding Florida Waters in March of 1979; and

(e) SFWMD has deliberately and consistently diverted polluted waters into Loxahatchee that have adversely affected native vegetative communities.

COUNT II

SFWMD HAVE VIOLATED STATE STATUTORY AND COMMON LAW BY OPERATING UNPERMITTED STRUCTURES

38. Plaintiff realleges paragraphs 1 through 37 above.

39. Florida law governing the issuance of DER permits to use or dispose of water are applicable to SFWMD when SFWMD operates and maintains pumps and other water control structures.

40. The pumps, water control structures, and canals operated by the SFWMD constitute stationary installations as defined by Florida Law.

41. SFWMD operates certain stationary installations, such as the S-5A and S-6 pumps, without permits from DER. These structures deliver large quantities of nutrient polluted water to Loxahatchee National Wildlife

Refuge. SFWMD also without DER permits operates structures S-7 and S-8 that deliver water to the Conservation Areas north of Everglades National Park.

42. Florida law requires that any stationary installation which may reasonably be expected to cause water pollution must not be operated without a permit.

43. SFWMD has violated Florida law by operating unpermitted stationary installations that have been shown to cause or contribute to pollution.

44. DER has violated Florida law by allowing SFWMD to operate such stationary installations without permits.

45. The operation of unpermitted structures has caused violations of State water quality standards in Loxahatchee and Everglades National Park.

46. Ambient water quality standards for Loxahatchee and Everglades National Park were established according to Florida law when they were designated as Outstanding Florida Waters on March 1, 1979.

47. Florida Code provisions dealing with Outstanding Florida Waters require that nutrient concentrations of a body of water cannot be altered to cause an imbalance in the natural populations of aquatic flora or fauna. Man-induced nutrient loading of water constitutes degradation under Florida law.

48. Since its designation in 1979 as an Outstanding Florida Water, Loxahatchee has suffered thousands of acres of change in its native vegetation causing an imbalance of the natural flora and fauna by giving rise to monocultures of cattails. These changes have been caused

by the nutrient-loaded waters delivered through the unpermitted S-5A and S-6 structures. The delivery of nutrient-loaded water constitutes a nuisance under Florida law.

49. The S-7 and S-8 structures have caused or contributed to increased pollution in the waters being delivered to Everglades National Park. If these discharges continue, they will result in the same vegetative changes. The discharges have already resulted in changes in the water and soils of Everglades National Park constituting a nuisance under Florida law.

COUNT III

SFWMD HAS BREACHED AN EXPRESS CONTRACT BY DIVERTING POLLUTED WATER INTO EVERGLADES NATIONAL PARK

50. Plaintiff realleges paragraphs 1 through 49 above.

51. On February 10, 1984, SFWMD entered into a contract with the National Park Service and the United States Army Corps of Engineers ("Corps"). This contract sets forth water quality standards for deliveries by SFWMD to the Park.

52. The terms of the contract specify water quality criteria for 27 parameters including nitrogen, phosphorus, dissolved oxygen, and trace metals. The concentrations of pesticides and herbicides in surface waters delivered to the Park are to be zero or below the level of detection. Federal, State, or local water quality criteria that are more stringent shall apply.

53. SFWMD contractually agreed, among other promises, to:

(a) Ensure that surface waters delivered to the Park are of sufficient purity to prevent ecological damage or deterioration of the Park's environment;

(b) Deliver water to the Park that meets the criteria set forth in the contract; and

(c) Take legal action where necessary to prevent ecological damage to, or deterioration of, the Park's environment from water quality violations.

54. SFWMD has breached the promises set forth in the contract. Data have been collected by the SFWMD and the Corps pursuant to the contract which document these violations.

55. Under the power delegated to SFWMD by DER, SFWMD has both the duty and the means to reduce levels of nutrients and other pollutants in the waters delivered to the Park. SFWMD is required to improve water quality through its permitting and other authority pursuant to state law. Plaintiff United States does not have the power to undertake such action.

56. Irreversible ecological damage to the sensitive and valuable resources of Everglades National Park will result if violations continue. Such damage will include, but is not limited to, changes in the native vegetative communities and fishery resources such as have already occurred at Loxahatchee National Wildlife Refuge where large segments of the diverse ecosystem have disappeared.

57. Everglades National Park preserves the heritage of all United States citizens and protects a resource of international significance. Money damages cannot compensate for any impact on, or loss of, this precious resource.

58. Everglades National Park has repeatedly insisted that SFWMD take action to prevent pollution of its water deliveries. All conditions precedent to the enforceability of the contract have been performed.

COUNT IV

SFWMD HAS BREACHED AN EXPRESS CONTRACT BY DIVERTING POLLUTED WATERS INTO THE LOXAHATCHEE NATIONAL WILDLIFE REFUGE

59. Plaintiff realleges paragraphs 1 through 58 above.

60. On June 8, 1951, the SFWMD entered a fifty year contract with the United States entitled "Cooperative and License Agreement between the Central and Southern Flood Control District and the United States of America," ("The contract"). See Exhibit C.

61. Paragraph 18 of the contract states, "[i]t is understood and agreed that in the operation and management of the Conservation area lands for the primary purpose of flood control and other allied purposes, the lands and waters will be managed and operated in the manner most consistent with Section 2 hereof, so far as it is not inconsistent with the said primary purpose."

62. Paragraph 2 of the contract states in part: "[t]he Service shall use said property as a Wildlife Management

Area, to promote the conservation of wildlife, fish, and game, and for other purposes embodying the principles and objectives of planned multiple use."

63. By diverting nutrient rich waters which are destroying the habitat necessary for conservation of wildlife, fish and game, the SFWMD has violated the express provisions of the contract.

PRAYER FOR RELIEF

Wherefore, Plaintiff requests that:

64. Defendants, DER and SFWMD, be mandated to carry out their statutory duties to enforce all applicable water quality standards in waters diverted to Loxahatchee and Everglades National Park.

65. Defendants, DER and SFWMD, be enjoined and restrained from delivering to Everglades National Park and Loxahatchee National Wildlife Refuge polluted and contaminated water.

66. Defendant SFWMD be enjoined and restrained from operating unpermitted stationary installations which are the subject of this lawsuit that cause or contribute to pollution to Everglades National Park and Loxahatchee National Wildlife Refuge.

67. Defendants, DER and SFWMD, be mandated to immediately take all actions within their authority to ensure that water delivered to Loxahatchee and Everglades National Park conform to the requirements of the 1951 and 1984 contracts, respectfully.

68. Defendant SFWMD be mandated to abate the nuisance.

69. The Court award such other relief as may be appropriate.

ROGER J. MARZULLA
ASSISTANT ATTORNEY GENERAL

DEXTER W. LEHTINEN
UNITED STATES ATTORNEY

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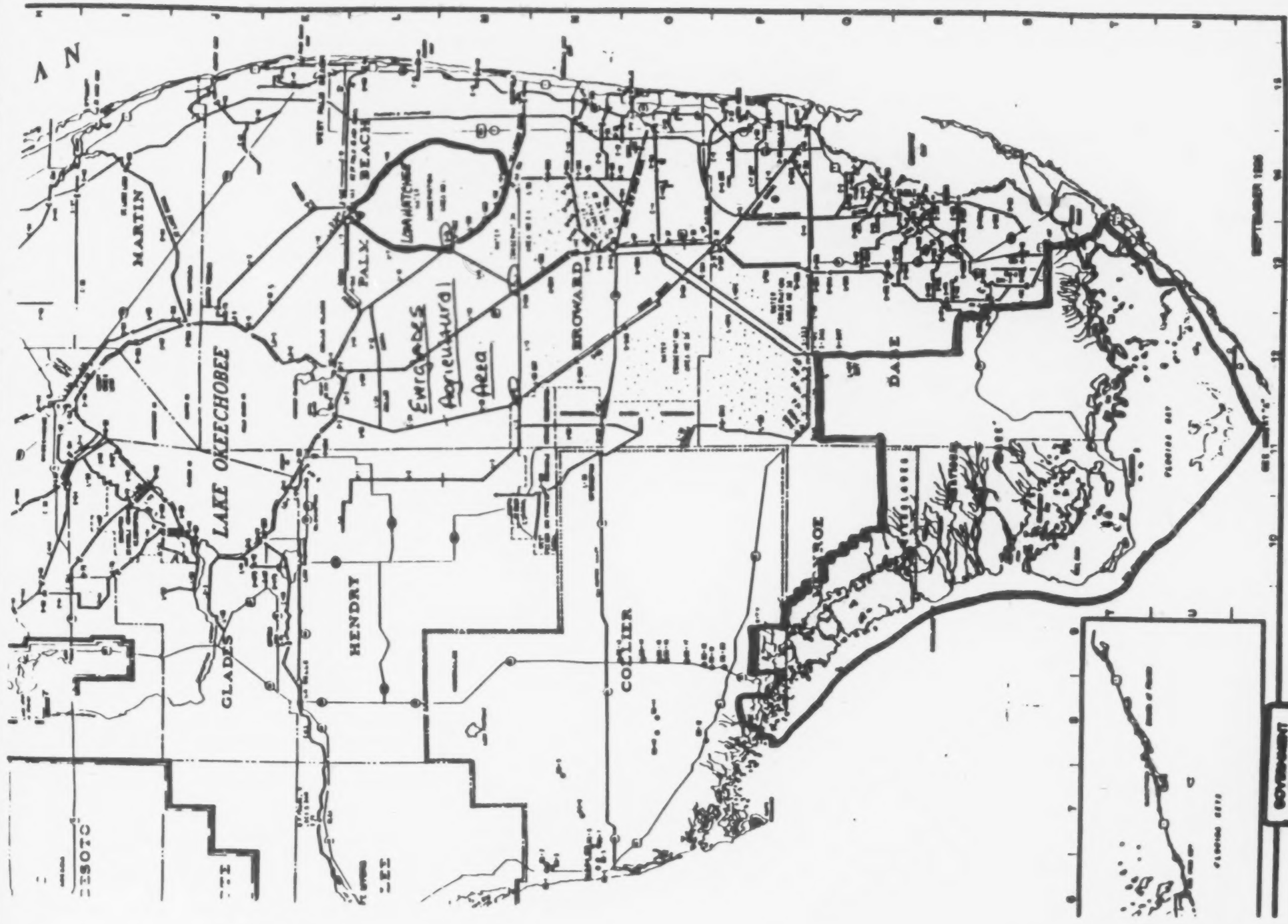
GOVERNMENT EXHIBIT A



GOVERNMENT EXHIBIT B

MEMORANDUM OF AGREEMENT AMONG THE ARMY CORPS OF ENGINEERS THE SOUTH FLORIDA WATER MANAGEMENT DISTRICT AND THE NATIONAL PARK SERVICE FOR THE PURPOSE OF PROTECTING THE QUALITY OF WATER ENTERING EVERGLADES NATIONAL PARK

Since the Congress, in connection with the Everglades National Park, has directed the Corps and the National Park Service "to reach an early agreement on measures to assure that the water delivered to the park is of sufficient purity to prevent ecological damage or deterioration of the park's environment." (River Basin Monetary Authorizations and Miscellaneous Civil Works Amendments, Senate Report No. 91-895, p. 24); and

The quality of existing water deliveries to the park does not depart significantly from that of waters which have not been altered by the works of man; and

The Corps, the National Park Service (NPS), and the Water Management District (WMD) are concerned that surface waters delivered to the park are not degraded;

THEREFORE, the Corps, NPS, and WMD (parties) mutually agree to the following:

1. Water Quality criteria for 27 parameters as enumerated in Appendix A shall apply only to surface waters delivered to the park. Federal, State, and local water quality criteria which are more stringent than those appended criteria shall continue to apply.

2. The concentrations of pesticides/herbicides in surface waters delivered to the Park are to be 0.0. Actual

concentrations are to be below the limits of detection. A listing of pesticides/herbicides is shown in Appendix B.

3. The Corps shall collect and analyze for specified parameters (see appendix A) and pesticide/herbicide residues (see appendix B) in surface water from delivery water locations (see appendix C). Sediment from the inflow stations will also be tested for trace metals and pesticide/herbicides. Sampling frequencies are described in appendix C.

4. The WMD shall collect and analyze for specified parameters (see appendix A) and pesticide/herbicide residues (see appendix B) in surface water from watershed locations (see appendix D). Sampling frequencies are described in appendix D.

5. The WMD shall also conduct diurnal studies for dissolved oxygen, specific conductance, pH, and water temperature at the inflow stations as described in appendix C.

6. All sample collection data and anaylses shall be reported monthly to NPS, Corps, and WMD.

7. The Corps, NPS, and WMD shall meet at such times as may be necessary at the request of any party, but not less frequently than once a year to review results of this agreement.

8. Should water quality criteria not be met and a clear and present danger to water quality has been determined to exist by the parties, appropriate actions or such legal process as may be necessary to restore or protect the quality of water entering the Park shall be taken by the Corps, NPS, and WMD.

9. This agreement may be revised upon mutual consent of all parties. A 90-day review period will be allowed for review of proposed changes to this agreement.

10. The Corps, NPS, and WMD recognize that the data base for the appended standards needs periodic review. Therefore, the standards will be reviewed for adequacy and necessary revisions in 1984 and periodically thereafter.

IN WITNESS THEREOF, THE PARTIES HERETO HAVE SIGNED THIS AGREEMENT ON THE DATES INDICATED.

SOUTH FLORIDA WATER
MANAGEMENT DISTRICT, BY
ITS GOVERNING BOARD

BY /s/
CHAIRMAN

DATE February 10, 1984

(CORPORATE SEAL)

ATTEST:

/s/ John R. Wodraska
SECRETARY

/s/ 2/9/84

/s/
AS TO WMD

THE UNITED STATES OF AMERICA
CORPS OF ENGINEERS

BY /s/
COLONEL, CORPS OF
ENGINEERS

DISTRICT ENGINEER
JACKSONVILLE DISTRICT

DATE Nov. 21, 1983

EXECUTED IN THE PRESENCE
OF:

AS TO CORPS OF ENGINEERS

THE NATIONAL PARK SERVICE

By /s/
SUPERINTENDENT
EVERGLADES NATIONAL PARK

DATE FEB 8 1984

EXECUTED IN THE PRESENCE
OF:

/s/ Gary Hendrix

AS TO NATIONAL PARK SER-
VICE

Parameter	Upper Limit*
A. Field Parameters	
1. Dissolved Oxygen (mg/1)	4.5
2. Spec Conductance (umho/cm² @ 25°C)	647
3. pH (units)	7.6-8.0
4. Temperature (°C)	not applicable
B. Physical Parameters	
1. Color (PCU)	124
2. Turbidity (NTU)	11
C. Nutrients	
1. Ortho Phosphorus (mg/1 as P)	0.02
2. Total Phosphorus (mg/1 as P)	0.24
3. NO_2 (mg/1 as N)	0.04
4. NO_3 (mg/1 as N)	0.7
5. NH_4 (Mg/1 as N)	0.24
6. Organic N (mg/1 as N)	2.1
D. Major Ions	
1. Calcium (mg/1)	86
2. Magnesium (mg/1)	25
3. Sodium (mg/1)	93

* Annual mean not to exceed this value. For dissolved oxygen, annual mean not to be less than this value.

4.	Chloride (mg/1)	143
5.	Iron (mg/1)	270
6.	Alkalinity (mg/1 as $CaCO_3$)	269
E.	Trace Metals	
1.	Mercury (ug/1)	0.5
2.	Cadmium (ug/1)	10
3.	Copper (ug/1)	8
4.	Lead (ug/1)	13
5.	Zinc (ug/1)	72
6.	Arsenic (ug/1)	20
F.	Biological Parameters	
1.	BOD (mg/1)	3
2.	Fecal Coliforms	To be determined
3.	Total Coliforms	To be determined

RATIONALE FOR UPPER LIMITS

Water quality data from inflow stations to the Park (S-12C and L-67A) for 1970-1978 were analyzed. From this data, upper limits for each parameter were computed based on control chart theory which uses the mean standard deviation, annual sampling frequency and control line factor.** These upper limits are to be used as criteria against which future water quality data could be compared.

** Bowker, A.H., G.J. Liberman 1972. Engineering Statistics, 2d ed., Prentice-Hall, Inc., Englewood, New Jersey.

PESTICIDES/HERBICIDES

- Aldrin
- Lindane
- Chlordane
- DDD
- DDE
- DDT
- Dieldrin
- Endrin
- Ethion
- Toxaphene
- Heptachlor
- Heptachlor E
- PCB
- Malathion
- Parathion
- Diazinon
- Methyl Parathion
- 2, 4, 5-T
- Silvex
- Trithion
- Methyl Trithion

Monitoring Locations

1. L-67 at S-12D
2. S-332
3. S-18C
4. Tamiami Trail between 40 Mile Bend and jetport

Field Parameters	Monthly
Physical Parameters	Monthly
Nutrients	Monthly
Major Ions	Monthly
Trace Metals	Monthly-water semiannually sediments
Biological Parameters	Quarterly
Pesticides/Herbicides	Quarterly-water semiannually sediments

(Map Omitted in Printing)

Monitoring Locations

1. S-178
2. S-177
3. S-176
4. L-28 gap
5. L-3 at Deer Fence Canal
6. S-140
7. S-8
8. S-7
9. S-11A, S-11B, and S-11C
10. S-9

(Map Omitted in Printing)

Field Parameters	Biweekly-bimonthly depending on flow
Physical Parameters	Biweekly-bimonthly depending on flow
Nutrients	Biweekly-bimonthly depending on flow
Major Ions	Biweekly-bimonthly depending on flow
Trace Metals	As needed based upon results of inflow monitoring (minimum semiannual survey)
Biological Parameters	As needed based upon results of inflow monitoring
Pesticides/Herbicides	As needed based upon results of inflow monitoring (minimum semiannual survey)

GOVERNMENT EXHIBIT C

COOPERATIVE AND LICENSE AGREEMENT BETWEEN THE CENTRAL AND SOUTHERN FLORIDA FLOOD CONTROL DISTRICT AND THE UNITED STATES OF AMERICA

THIS AGREEMENT, Made and entered into between the Central and Southern Florida Flood Control District, (hereinafter referred to as the District), pursuant to Chapters 25209 and 25214, Laws of Florida, Acts of 1949, and the United States Department of the Interior, acting by and through the Fish and Wildlife Service (hereinafter referred to as the Service), pursuant to the Act of August 14, 1946 (60 Stat. 1080).

WITNESSETH:

The parties hereto, for themselves and their respective successors and assigns, do hereby mutually covenant and agree as follows:

1. The District hereby grants a license upon, and makes available to the Service for the purposes and subject to the terms and conditions hereinafter set forth, all those portions of the real property, or interests therein, acquired or to be acquired by the District in connection with the area designated as Conservation Area Number One, a part of the Central and Southern Florida Flood Control District, in Palm Beach County, Florida, together with all improvements which are located thereon (hereinafter referred to as the property). Those portions of the

property already acquired by the District in connection with Conservation Area Number One, which are to made subject to the terms and conditions of this license and agreement, are described in "Exhibit A", and those portions of the property to be acquired by the District in connection with Conservation Area Number One, which are to be made subject to the terms and conditions of this license and agreement, are described in "Exhibit B", such exhibits being attached hereto and expressly made a part hereof. The property described in "Exhibit B", or any part of such property, shall become subject to all of the terms and conditions of this license and agreement, or any renewal thereof, when any interest or title thereto has vested in the District, but not before such time. The District shall notify the Service in writing when title to any of the property described in "Exhibit B" has vested in the District.

2. The Service shall use said property as a Wildlife Management Area, to promote the conservation of wildlife, fish, and game, and for other purposes embodying the principles and objectives of planned multiple land use.

These objectives are to be attained through the following management practices covering the wildlife and recreational phases of land use represented by this area.

(a) Wildlife:

Adequate provision shall be made to maintain the wildlife resources in a productive condition through:

(1) Maintaining as closed areas for breeding and feeding grounds so much of the unit as will ensure maximum

stocks of game, fish and furbearers and thus permit the harvesting of surpluses.

(2) Maintenance and development of wildlife environments and habitat where such use is not inconsistent with the use of land for flood control and water retention purposes.

(3) Planting of cultivated crops and natural wildlife foods to increase the carrying capacity of the area for wildlife.

(4) Construction, operation, and maintenance of such canals, ditches, and subimpoundments as may be deemed necessary by the Service for the purpose of creating conditions suitable for wildlife species using the area. Provided, that such construction, operation and maintenance shall be consistent with the objectives of flood control and other allied purposes in the area.

(5) Opening by regulation of the Service of portions of the area to controlled public hunting, fishing and trapping, whenever the Service determines such procedure to be necessary for the harvesting of surplus stocks of game, fish and furbearers. Open season shall be limited to the period necessary only for harvesting the surplus stock and shall conform to State law and regulation.

(b) Recreation:

Recreational facilities existing, or to be developed, shall be operated, maintained, and administered according to the following principles and objectives:

(1) The recreational facilities shall be available for the use and benefit of the general public.

(2) Fees charged for the use of the facilities shall be non-discriminatory and consistent with the public non-profit character of the area. Such controlled public hunting and fishing as is allowed by the Service shall be made available to the general public without charge.

(3) All recreational facilities which may be developed in the future shall be located where their use will not interfere with the use of the land for flood control and water retention purposes.

(c) Monies obtained from the sale or granting of permits by the Service for trapping and other economic uses are to be retained by the Service for deposit and distribution under Section 401 of the Act of June 15, 1935 (49 Stat. 383-16 U.S.C. 715s).

3. The use of said property by the Service shall be subject to the requirements and uses by the Corps of Engineers and the District for flood control and other allied purposes and the Service shall not be obligated in any manner for costs, charges, expenses, or other obligations as are properly chargeable to the maintenance and development of the flood control activities. The use of said property shall be further subject to all valid easements, rights-of-way, licenses, and outstanding interests in, upon, across, or through said property.

4. The District reserves all rights not vested in private persons, corporations or other public agencies, to the oil, gas, coal and other mineral ores whatsoever, upon, in

or under said property, together with the using mineral rights, powers and privileges, including the right of access to the use of such parts of the surface of the premises as may be necessary for mining and saving said minerals. The Service, however, shall have the right to use stone, marl, sand or peat and similar substances from said property, provided such materials are used for construction purposes upon or in connection with said property. The license herein granted to the Service is subject to the rights of the District and to the rights heretofore vested in private persons, and public agencies, as the same appear of record, to mine, explore for and develop, any mineral in, under or upon said lands, including oil and gas, and including the right of ingress and egress on, upon or across such lands as may be necessary for the purposes stated.

In the event the District determines that the exercise of the said mining rights are necessary and not inconsistent with the purposes referred to in Section 2 above, it agrees that the exploration by the District, its successors or assigns, the drilling for, development of, and the transportation or removal of mineral resources, including oil, and the control of abandoned wells or wells taken out of production, shall be conducted by the most approved methods. Paramount consideration shall be given to the prevention both of pollution and contamination by oil or field brine and of other oil field contamination or damage of the lands for wildlife refuge purposes. Human occupancy and housing facilities therefor and structures erected for drilling, development, transportation or removal of mineral resources, will be held to a minimum. Any inevitable waste in proximity to the sources will be

so confined as to prevent escape that might otherwise occur as a result of rains or high water.

Suitable provision will be made for the removal of oil field brine from the area, by pipe line or any other approved method, so as not to contaminate the lands or the water in the ponds or lakes now created or that may hereafter be created.

5. The term of this license and agreement shall be fifty (50) years beginning on the 1st day of January, 1951, and ending on the 1st day of January, 2001, and shall automatically be renewed for three (3) successive terms of fifteen (15) years unless written notice to the contrary is given by either party to the other not less than ninety (90) days prior to the termination of this instrument, or any renewal thereof, and each renewal shall be subject to all of the terms and conditions of this license and agreement.

6. The Service shall not use or permit to be used, and shall take such measures as may be necessary to prevent the use or occupancy of said property, or any portion thereof, for any purpose which is inconsistent or incompatible with the purposes set forth in Section 2 above; nor shall the Service, except with the written consent of the District, assign any of its rights or obligations under this license and agreement, or any renewal thereof, or grant or create any rights in favor of third persons with reference to said property. This provision shall not be construed to apply to such employees of the Service as are engaged in the administration of said property during the period they are actually so engaged.

The Service shall not, except with the written consent of the District, authorize or permit third persons including employees of the Service engaged in the administration of the area, to erect structures or dwellings on the property, whether such authorization or permission creates any rights in such third persons or not. This provision shall not be construed as requiring a permit from the Service to mine, explore or develop the minerals, including oil and gas, as provided for in Section 4.

7. The Service shall assume and defray all costs, charges, expenses, and other obligations except as otherwise provided for under Section 3, incident to the use of said property for the purposes provided herein, shall maintain said property in good condition and repair, making all repairs and replacements necessary caused by deterioration, damage, use, negligence, or any other cause whatsoever, and shall not remove any improvements except in accordance with Section 12 below, or alter any major improvements without the written consent of the District.

8. The obligations of the Service under this agreement are conditioned upon the passage of an appropriation by Congress from which expenditures thereunder may be made and shall not obligate the Service upon the failure of Congress to so appropriate.

9. The District agrees to hold and save the Service free from damages due to the right to operate under the terms of this license and agreement. The Service agrees to hold and save the District free from damages due to operations under the terms of this license and agreement.

10. The Service shall submit, not later than one year after the effective date of this license and agreement, a general plan of operation and development, setting forth the measures to be taken by the Service to effectuate the purposes of this license and agreement. The Service shall also permit at all times, any duly authorized representative or representatives of the District to enter upon and inspect said property.

11. Upon the expiration or termination of this license and agreement, or any renewal thereof, the Service shall quietly and peaceably vacate said property and surrender possession thereof, and the District may immediately, or at any time thereafter, re-enter and take possession of the property and remove all persons therefrom.

12. Upon the expiration or termination of this license and agreement, or any renewal thereof, the Service shall have the right to remove only those improvements which have been erected exclusively with funds specifically or generally appropriated by the Congress of the United States. Provided, however, that no such right for removal shall extend to, or include, any works constructed as part of the flood control program.

13. The invalidity of any provision of this instrument, or of any part thereof, shall not affect the validity of the remaining provisions or the rights and obligations of the parties thereunder.

14. The failure of the District to insist upon the strict performance of any of the terms, covenants, agreements and conditions herein contained shall not constitute a waiver or relinquishment of the right of the District to enforce thereafter such terms, covenants, agreements,

or conditions, but the same shall continue in full force and effect.

15. Any notice, consent, or other actions to be given or done by the District under this license and agreement, or any renewal thereof, shall be valid only if in writing and executed by the Chairman of the Board of Governors of the Central and Southern Florida Flood Control District, or his duly authorized representative, or in the case of a successor to the rights of the Central and Southern Florida Flood Control District, by the chief administrative officer of such successor, or his duly authorized representative. All notices to be given by the District under this license and agreement, or any renewal thereof, shall be delivered or forwarded by mail to the Director, Fish and Wildlife Service, United States Department of the Interior, Washington, D. C.

Any notice, consent, or other action to be given by the Service under this license and agreement, or any renewal thereof, shall be valid only if in writing and executed or performed by the Secretary of the Interior or his duly authorized representative, or in the case of a successor to the rights of the Department of the Interior, by the chief administrative officer of such successor or his duly authorized representative. All notices to be given by the Service under this license and agreement, or any renewal thereof, shall be delivered or forwarded by mail, addressed to the Central and Southern Florida Flood Control District, West Palm Beach, Florida, or its successor hereunder.

16. No member of or delegate to Congress or Resident Commissioner shall be admitted to any share or part

of this license and agreement, or any renewal thereof, or to any benefit to arise therefrom.

17. This license and agreement shall become effective when duly executed by all parties indicated below, but possession of the said property shall not be granted until January 1, 1951, the beginning of the 50-year primary term provided for in paragraph 5 hereof.

18. It is understood and agreed that in the operation and management of the Conservation area lands for the primary purpose of flood control and other allied purposes, the lands and waters will be managed and operated in the manner most consistent with Section 2 hereof, so far as it is not inconsistent with the said primary purpose.

IN WITNESS WHEREOF, the parties hereto have hereunto subscribed their names as of the dates indicated.

CENTRAL AND SOUTHERN
FLORIDA FLOOD
CONTROL DISTRICT

Date Nov. 20, 1950 BY /s/ Jor S. Earman
Chairman of the Board of
Governors

THE UNITED STATES OF
AMERICA

Date JUN 8, 1951 _____
Secretary of the Interior

BY /s/ Allen M. Day
Director, Fish and Wildlife
Service

EXCERPT FROM THE MINUTES OF THE MEETING ON NOVEMBER 10, 1950, OF THE GOVERNING BOARD OF CENTRAL AND SOUTHERN FLORIDA FLOOD CONTROL DISTRICT.

The lease and cooperative agreement for the use of Conservation Area Number One by the U. S. Fish and Wildlife Service as a wildlife and migratory bird refuge was read and considered in relation to the multiple purposes of the flood control plan. Upon recommendation by the Engineering and Legal Departments and upon motion of Commissioner Rogers, seconded by Commissioner Driggers and unanimously carried, the lease and cooperative agreement as read, a copy of which is annexed to these Minutes, was approved and the Chairman was authorized and directed to execute the same for and on behalf of and in the name of the District.

(Insert Cooperative Agreement)

I, W. Turner Wallis, Secretary of Central and Southern Florida Flood Control District, do hereby certify that the foregoing is a true and correct copy of an excerpt from the Minutes of a meeting of the Governing Board of Central and Southern Florida Flood Control District, held on November 10, 1950.

In witness whereof, I have hereunto set my hand and affixed the seal of the District this 22nd day of November, 1950.

/s/ W. Turner Wallis
W. Turner Wallis,
Secretary

The first amendment to the Cooperative and License Agreement, dated July 8, 1953, establishing the southern and southwestern boundaries of Conservation Area No. 1 to be the centerline of Levee L-39, is omitted.

The second amendment dated December 15, 1959, modifying the northern and southern boundaries of Conservation Area No. 1 is omitted.

The third amendment signed July 18 and 23, 1962, reestablishing the southwest boundary of Conservation Area No. 1 is omitted.

No. 91-212

In The

Supreme Court of the United States

October Term, 1991

WESTERN PALM BEACH COUNTY FARM BUREAU, INC., ROTH FARMS, INC. and K.W.B. FARMS,

Petitioners,

v.

UNITED STATES OF AMERICA,

FLORIDA KEYS CITIZEN COALITION, FLORIDA WILDLIFE FEDERATION, ENVIRONMENTAL DEFENSE FUND, SIERRA CLUB, NATIONAL WILDLIFE FEDERATION, WILDERNESS SOCIETY, NATIONAL PARKS & CONSERVATION ASSOCIATION, DEFENDERS OF WILDLIFE, FLORIDA AUDUBON SOCIETY and TREASURE COAST ENVIRONMENTAL COALITION,

SOUTH FLORIDA WATER MANAGEMENT DISTRICT and TIMER E. POWERS, its Interim Executive Director, FLORIDA DEPARTMENT OF ENVIRONMENTAL REGULATION and CAROL M. BROWNER, its Secretary,

FLORIDA SUGAR CANE LEAGUE, INC., FLORIDA FRUIT and VEGETABLE ASSOCIATION, BEARDSLEY FARMS, INC., CITY OF BELLE GLADE, and CITY OF CLEWISTON,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

SUPPLEMENTAL BRIEF OF PETITIONERS WESTERN PALM BEACH COUNTY FARM BUREAU, INC., ROTH FARMS INC., and K.W.B. FARMS

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SUPPLEMENTAL BRIEF OF PETITIONERS

This brief calls to the Court's attention, Rule 15.7, two litigation events occurring since we petitioned for writ of certiorari – "intervening matter not available at the time of the party's last filing" – which bear on the Court's decision to review, or not, the Eleventh Circuit decision refusing to take up and decide the Article III jurisdictional question that we and others raised there in bar of any federal adjudication of this claim.

The central issue in Questions 2, 3 and 4 is whether the Case-or-Controversy limitation in Article III excludes as nonjusticiable a federal court suit in the name of the United States against a State, not consented to by any clear statement of State statute, nor founded in any clear statement of the Constitution, or Act of Congress, or contract with the State, to compel the State to adopt and enforce a regulatory code implementing general statutory policy of the State in a manner deemed by a federal judge to satisfy proprietary interests of the United States.

Of course, Questions 2, 3 and 4 are impotent if no federal court need decide them. Federalism as embodied in the structure of the Constitution, and in Article III, requires a judicial voice; it is not self-vindicating. Question 1 is whether a United States court of appeals must decide such jurisdictional questions when they are raised in a pending case.

Now the district court as well, acting on the mandate, refuses to consider any question of its want of jurisdiction.

As our petition has shown, the court of appeals declared, "We decline to consider this motion" –

petitioners' Suggestion and Motion as to Lack of Jurisdiction – after refusing to consider, as well, a tendered amicus suggestion of "lack of jurisdiction in this and the district court for want of a justiciable case or controversy" (Pet. A23).

The court of appeals ordered, "The Farm Interests may still seek to present their jurisdictional motion to the District Court" (Pet. A24).

While petitioning this Court, we also filed in the district court on remand a comprehensive Suggestion of Lack of Article III Jurisdiction. On August 22, 1991, on motion by the United States, the district court ordered that Suggestion *stricken*: "Order Granting United States' Motion to Strike the Suggestion of Lack of Article III Jurisdiction by Intervenor Defendants Farm Bureau, Roth Farms, K.W.B. Farms." Supp. A1 et seq., appended to this brief.

The district court's order is understandable, perhaps, in light of a court of appeals mandate which so discourages any contest of the federal judicial power in the premises. "If they choose this step," the court of appeals said of petitioners renewing their Article III challenge in the district court, petitioners "will be well advised to ask the District Court's permission first" (Pet. A24).

The mandate then added further advice to the district court itself: "the District Court may condition the Farm Interests' intervention in this case on such terms as will be consistent with the fair, prompt conduct of this litigation" and may "dispose in summary fashion (as we have done here) of any motions that the Farm Interests may

file beyond the scope of their right to participate in these proceedings" (Pet. A24).

So in ordering our Suggestion *stricken*, refusing to consider it at all, the district court stated (Supp. A1) that the court of appeals had *denied* the jurisdictional objection in that court: "In denying this motion, the Eleventh Circuit stated . . . . " (Supp. A2).

The district court further declared that petitioners' "broad attack on the Court's jurisdiction over the entire underlying proceeding . . . greatly exceeds the limited scope of intervention granted by the Eleventh Circuit," described as a limited "right to participate in the development of numeric water quality standards" to be promulgated and enforced by State regulation (Supp. A2).

These events dramatize the importance of the questions now presented for certiorari review.

Heretofore this Court has prescribed a rule "inflexible and without exception" as regards the necessity that federal courts ferret out and resolve any doubt about their Article III jurisdiction – whether the parties protest it, agree to it, acquiesce, stand silent, or whatever. Describing that necessity as "springing from the nature and limits of the judicial power of the United States," the Court expounded its rule "inflexible and without exception" in *Mansfield, C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 382 (1884) and *Insurance Corp., of Ireland, Ltd. v. Compagnie des Bauxites de Guinea*, 456 U.S. 694, 702 (1982), among other decisions previously cited.

This rule admits no exception whereby a federal court protects itself from inquiring as to its want of

jurisdiction by muzzling the parties litigant. This litigation, after all, seeks a federal judicial decree that the State promulgate more aggressive State regulation, under State law, of the Farm Interests whose farming is decried in the complaint (Am. Compl. ¶¶ 13 et seq., Pet. A38 et seq.). Shall these federal courts by confining petitioners to "participat[ing] in the development of numeric water quality standards" – a State law process that petitioners insist cannot lawfully be seized, performed or coerced by a federal court – then foreclose any effective contest of this arrogation of power?

The district court's action on the mandate illuminates the court of appeals decision presented for review and directly puts in jeopardy this Court's decision in *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 76, 77 (1988), where this Court gave voice even to a *nonparty* affected by the proceedings below – a witness, held in contempt – to contest the federal court's subject matter jurisdiction of the underlying case:

> Once the right to appeal a civil contempt order is acknowledged, arguments in its legitimate support should not be so confined that the power of the issuing court remains untested. . . .
>
> The challenge in this case goes to the subject-matter jurisdiction of the court and hence its power to issue the order. The distinction between subject-matter jurisdiction and waivable defenses is not a mere nicety of legal metaphysics. It rests instead on the central principle of a free society that courts have finite bounds of authority, some of constitutional origin, which exist to protect citizens from the very

> wrong asserted here, the excessive use of judicial power. The courts, no less than the political branches of the government, must respect the limits of their authority.

The district court's action on the mandate is significant for the further reason that it wrongly attributes *res judicata* effect to the court of appeals' refusal to consider the issue of its jurisdiction. *Res judicata* no more justifies the district court in evading the issue than it justifies the court of appeals in reasoning, similarly, that (Pet. A25) "the Farm Interests are adequately represented on the jurisdictional issues by the defendants South Florida Water District and Florida Department of Environmental Regulation, which have already raised many of these issues with the District Court." Even had the Florida agencies contested the district court's jurisdiction as do petitioners (they didn't), and even if they were petitioners' privies (they weren't), no nonfinal district court affirmation of jurisdiction could excuse the court of appeals from deciding the issue. *Res judicata* cannot foreclose even collateral attacks, let alone direct linear attacks on appeal, without affording an opportunity, in the court of last resort, to contest subject matter jurisdiction. *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites,* 456 U.S. 694, 702 fn. 9 (1982), and cases cited.

Even here the Florida agency parties are silent as to this federal court coercion of sovereign State functions.

The Court will have taken note that the two Florida agency defendants have thus far stood silent in this Court. They were passive, as well, in the court of appeals.

It adds to the importance of this Court's vigilance over Article III, we submit, when agents of a sovereign State are neither here nor there on whether, as the court of appeals put it, "the state is not doing its job and statutory authority supports federal proceedings" (Opinion, 922 F.2d at 709 fn. 7, Pet. A 11 fn. 7):

> Viewed from a different angle, Count I of the Complaint seeks to move a state administrative task – development of standards for implementing the broad commands of the [Florida] SWIM Act – to federal court. If the state is not doing its job and statutory authority supports federal proceedings.

No federal court has yet inquired whether "statutory authority supports federal proceedings." The courts below are all too satisfied, however, to inquire whether "the state is not doing its job" under State law.

The federal judicial proceedings below are coercive of a sovereign State function. The State administrative process is by State design free of federal judicial coercion. The only possible justification for such coercion is superseding jurisdiction under Article III. Two courts below have refused to address that issue.

To preserve uniformity in this Court's supervision of the lower federal courts exercising Article III powers and obeying its limitations, this case should be taken for review.

Respectfully submitted,

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Counsel of Record for Petitioners

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 88-1886-
CIV-HOEVELER

UNITED STATES OF AMERICA,
et al.,

Plaintiffs,

vs.

SOUTH FLORIDA WATER
MANAGEMENT DISTRICT; TIMER
E. POWERS, Interim Executive
Director, South Florida
Water Management District;
FLORIDA DEPARTMENT OF
ENVIRONMENTAL REGULATION;
and CAROL M. BROWNER,
Secretary, Florida Department of
Environmental Regulation,
et al.,

Defendants.

ORDER GRANTING UNITED STATES' MOTION TO STRIKE THE SUGGESTION OF LACK OF ARTICLE III JURISDICTION BY INTERVENOR DEFENDANTS FARM BUREAU, ROTH FARMS, K.W.B. FARMS

(FILED AUG 22, 1991)

THIS CAUSE is before the Court on the United States' Motion, pursuant to Fed. R. Civ. P. 12(f), to Strike the "Suggestion of Lack of Article III Jurisdiction" filed by Intervenor Defendants Farm Bureau, Roth Farms, and K.W.B. Farms ("Farm Bureau").

In its opinion granting the Farm Bureau intervention as to Count I of the United States' Amended Complaint, the Eleventh Circuit limited intervention to the development of numeric water quality standards. *United States v. South Florida Water Management District*, 922 F.2d 704 (11th Cir. 1991). Despite this limited grant of intervention, the Farm Bureau subsequently filed with the Eleventh Circuit a "Suggestion and Motion as to Lack of Federal Jurisdiction," in which the Farm Bureau requested dismissal of the entire case. In denying this motion, the Eleventh Circuit stated:

> As we have held in our opinion in the underlying appeal, the Farm Interests may intervene in this case to protect their right to participate in the development of numeric limits implementing the state's narrative water quality standards. The jurisdictional issues that the Farm Interests raise in their motion are only indirectly related to the protection of this right. Further, the Farm Interests are adequately represented by the defendants South Florida Water District and Florida Department of Environmental Regulation, which have already raised many of these issues with the District Court.
>
> The Farm Interests may still seek to present their jurisdictional motion to the District Court. If they choose this step, they will be well advised to ask the District Court's permission first. As we have stated, the District Court may condition the Farm Interests' intervention in this case on such terms as will be consistent with the fair, prompt conduct of this litigation. This authority allows the District Court to dispose in summary fashion (as we have done here) of any motions that the Farm Interests may file beyond

the scope of their right to participate in these proceedings.

United States v. South Florida Water Management District, (11th Cir. March 22, 1991).

The Suggestion filed with this Court, even more so than that presented to the Eleventh Circuit, constitutes a broad attack on the Court's jurisdiction over the entire underlying proceeding. As such, it greatly exceeds the limited scope of intervention granted by the Eleventh Circuit. This Court's Order of July 9, 1991, implementing the mandate of the Eleventh Circuit should be construed by all parties to this case as granting the Farm Interests intervention no broader in scope than that recognized by the court of appeals as necessary to protect the Farm Interests' right to participate in the development of numeric water quality standards. Accordingly, it is

ORDERED AND ADJUDGED that the motion to strike the Farm Bureau's Suggestion of Lack of Article III Jurisdiction is GRANTED.

DONE AND ORDERED in chambers at Miami, Florida this 22nd day of August, 1991.

/s/ William M. Hoeveler
WILLIAM M. HOEVELER
United States District Judge

cc: All counsel of record

(3)

No. 91-212

In the Supreme Court of the United States

OCTOBER TERM, 1991

WESTERN PALM BEACH COUNTY FARM BUREAU, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

BARRY M. HARTMAN
Acting Assistant Attorney General

ELLEN J. DURKEE
Attorney
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QUESTION PRESENTED

Whether, in an interlocutory appeal from the district court's denial of petitioners' motion to intervene, the court of appeals erred by declining to rule on petitioners' contention, raised for the first time in a filing made after the court of appeals issued its opinion in this case, that this suit was barred on sovereign immunity grounds.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-212

WESTERN PALM BEACH COUNTY FARM BUREAU, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The decision of the court of appeals (Pet. App. A1-A20) is reported at 922 F.2d 704. The order of the court of appeals denying petitioners' "Suggestion and Motion as to Lack of Jurisdiction" (Pet. App. A24-A25) is not reported. The district court orders denying petitioners' motions for intervention are not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 22, 1991. A petition for rehearing was denied on May 7, 1991 (Pet. App. A30). The petition for a writ of certiorari was filed on August 5, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case arises from an action brought by the federal government to require agencies of the State of Florida to take certain steps to end pollution in the Arthur R. Marshall Loxahatchee Wildlife Refuge and the Everglades National Park.

1. The Loxahatchee Wildlife Refuge is a federal wildlife sanctuary managed by the U.S. Fish and Wildlife Service, an agency of the Department of the Interior. Most of the refuge land is leased under a long-term lease signed on June 8, 1951, from the South Florida Water Management District (SFWMD), a state instrumentality that is one of the defendants in this case. Pet. App. A49-A50, A63-A72.

The Everglades National Park is federally owned and administered by the National Park Service, an agency of the Department of the Interior. In 1934 Congress authorized the establishment of the Park and provided that it be permanently reserved as wilderness in which no activity may be undertaken that would interfere with preservation of the native flora and fauna and primitive natural conditions. 16 U.S.C. 410(c). A 1970 congressional report described the Park as the "largest and most important subtropical wilderness in North America" that "contains perhaps the most fragile and unique plant and animal communities in the national park system." H.R. Rep. No. 1455, 91st Cong., 2d Sess. 2-3 (1970). The Report recognized that the Park's ecosystem is dependent on, and sensitive to, the water quantity and quality flowing into the park. *Ibid.*

2. On October 11, 1988, the United States brought this action against two Florida state agencies, the Florida Department of Environmental Regulation (DER) and the SFWMD, and against two state offi-

cials in their official capacity, the Secretary of DER and the Executive Director of SFWMD. Pet. App. A34-A37. An amended complaint, filed on December 23, 1988, was the basis for the court of appeals' decision.[1] Pet. App. A4 n.1. The complaint alleges that the hallmark characteristic of the Everglades aquatic ecosystem is the need for nutrient-lean conditions, and that aquatic life and vegetation, which are essential to preservation of the ecosystems in the Refuge and Park, are being destroyed because the state defendants, in violation of state law and of contracts with the federal government, have diverted nutrient-polluted agricultural water into, or toward, the fragile Everglades ecosystems in the Park and Refuge. Pet. App. A36-A41.

The complaint contains four counts. Count 1 (Pet. App. A42-A45) alleges that existing state water quality standards are being violated.[2] Count 1 fur-

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[1] The United States later filed a second amended complaint. This brief will refer to the first amended complaint, on which the court of appeals based its decision. In any event, the changes made in the second amended complaint are not material to the issues presented in this petition.

[2] Water quality standards applicable to the Park and Refuge include numeric and narrative Class III water quality standards, which were promulgated in 1972, F.A.C. 17-3.121, and an antidegradation standard based on designation of the Park and Refuge as "Outstanding Florida Waters" (see note 4, *infra*). In addition, the Surface Waters Improvement and Management Act of 1987 ("SWIM Act"), Fla. Stat. Ann. §§ 373.451-373.456 (West 1988 & Supp. 1991), provided that SFWMD shall not divert waters to the Park in such a way that state water quality standards would be violated or nutrients in diverted waters would adversely affect native vegetative communities or wildlife. Fla. Stat. § 373.4595(2)(a)1 (West 1988); Pet. App. A43.

Although four years have passed since the SWIM Act was enacted, the state defendants have not yet produced an ap-

ther alleges that both DER and SFWMD have the power and responsibility under Fla. Stat. chapters 373 and 403, to enforce state water quality standards, including the power to issue and enforce permits to ensure that waters are protected in accordance with state regulations.[3]

Count 2 (Pet. App. A45-A47) alleges that DER's failure to require permits for the structures operated by the SFWMD, and SFWMD's operation of unpermitted structures, violates state law.[4] See Fla.

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proved, final SWIM plan. The SWIM Act was supplemented by the Florida Legislature's recent enactment of the Marjory Stoneman Douglas Everglades Protection Act, Fla. Stat. Ann. § 373.4592 (West Supp. 1991), which became effective on July 1, 1991 and, among other things, sets more specific requirements for the Plan and sets schedules for completion of and compliance with the Plan.

On July 26, 1991, the United States and the state defendants executed a settlement agreement resolving all of their respective claims in this case, and a motion for approval of the agreement is presently pending before the district court. The settlement agreement between the state defendants and United States requires completion of the SWIM Plan on a schedule consistent with the 1991 Act.

[3] Florida Stat. Ann. § 403.412 (West 1988 & Supp. 1991) provides that a governmental agency charged with the duty of enforcing the laws, rules, and regulations for the protection of water and other natural resources may be compelled to enforce such laws, rules, and regulations in an action for injunctive relief. The DER has supervisory authority over five regional water management districts, including the SFWMD, *id.* § 373.026, but delegates much of its power to those districts. *Id.* § 373.069.

[4] In 1979 the State designated the Park and Refugee as "Outstanding Florida Waters." As a result, Florida law prohibits the lowering of the ambient water quality below the quality that existed prior to 1979. F.A.C. 17-3.041, 17-4.242 (1) (a) 2.d. Notwithstanding the establishment of this water quality standard, commencing in 1979 the state defendants

Stat. Ann. ch. 403 (West 1988) and F.A.C. ch. 17-4. The second count also alleges that SFWD's delivery of contaminated water to the Park and Refuge through unpermitted structures constitutes a nuisance for which relief may be granted.

Count 3 alleges breach of a 1984 contract between the SFWMD, the National Park Service, and the United States Army Corps of Engineers. Pet. App. A47-A49, A54-A62. In the contract, SFWMD promised that water it sends to Everglades National Park would meet certain minimum, numerical water quality standards. Pet. App. A54, A58-A59. The contract also requires SFWMD to comply with state or federal quality criteria that are more stringent than the enumerated minimum levels. Pet. App. A54-A55. Finally, it requires SFWMD to take legal action where necessary to restore or protect the quality of water entering the Park. Pet. App. A55.

Count 4 is another contract claim, based on the lease agreement between SFWMD and the United States for use of state-owned land as a federal wildlife refuge. Pet. App. A49-A50, A63-A64. The contract provides that the Refuge shall be used in a manner consistent with wildlife management. Pet. App. A49-A50. The complaint alleges that SFWMD has breached the contract by diverting nutrient-polluted water, which is degrading the habitat necessary for conservation of wildlife, fish and game. Pet. App. A50.

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began diverting more contaminated water directly into the Refuge and toward the Park. Pet. App. A40. The court of appeals viewed the allegation that state defendants have violated the water quality standards applicable to "Outstanding Florida Waters" as part of Count 2, a claim as to which petitioners were not allowed to intervene. Pet. App. A8.

The complaint seeks injunctive relief to compel the state defendants to regulate the quality of water flowing onto federal property to the extent mandated by state law. It also seeks to compel performance of the contractual obligations alleged in Counts 3 and 4. Pet. App. A50-A51.

4. On December 16, 1988, petitioners and other parties, known collectively as "Farm Interests," [5] filed a motion to intervene as of right under Federal Civil Procedure Rule 24(a) or, in the alternative, to be granted permissive intervention under Rule 24(b). Farm Interests consisted of individual farms and organizations whose members farm in an area known as the Everglades Agricultural Area. The district court denied the motion to intervene by order entered on July 27, 1989. Farm Interests filed a notice of appeal from the order denying them intervention on September 25, 1989. On the same day, Farm Interests filed a renewed motion for intervention in the district court, which the court denied on December 1, 1989. Farm Interests filed another notice of appeal from this second denial of intervention. The two appeals were consolidated.

The only issue addressed in the appellate briefs and at oral argument was whether Farm Interests should be allowed to intervene in the case. In an opinion issued January 28, 1991, a divided panel of the Eleventh Circuit first held that it had jurisdiction over this interlocutory appeal, relying on what it termed the "anomalous rule" of the Eleventh Circuit that a court of appeals has jurisdiction over an interlocu-

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[5] The other parties were Florida Fruit and Vegetable Growers Association, Florida Sugar Cane League, Inc., and Beardsley Farms, Inc.

tory appeal of a district court order denying intervention only if the district court order is incorrect. Pet. App. A4-A5 (citing *Weiser* v. *White*, 505 F.2d 912, 916 (5th Cir.), cert. denied, 421 U.S. 993 (1975)). The court proceeded to reverse the district court in part, holding that Farm Interests had a limited right to intervene as to Count 1 with regard to the setting of numeric limits implementing state narrative water quality standards. Pet. App. A7-A14. Judge Hatchett filed a dissenting opinion stating that he would affirm the district court's denial of intervention in full. Pet. App. A19-A20.[6]

On February 19, 1991, Farm Interests filed a petition for rehearing as to that portion of the decision denying intervention of right as to Counts 2, 3, and 4. Farm Interests simultaneously filed a pleading styled "Suggestion and Motion as to Lack of Federal Jurisdiction," in which they asserted, based on a variety of arguments, that the district court proceedings should be dismissed. (Pet. App. A24) Among the contentions advanced by Farm Interests in this pleading were that the United States had no standing under state law to assert Counts 1 and 2, that the nuisance claim was barred by the Florida Right to Farm Act, Fla. Stat. Ann. § 823.14 (West Supp.

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[6] The court of appeals unanimously held that Farm Interests had no right to intervene on the other three claims in the United States' amended complaint. Pet. App. A14-A17. The district court's denial of permissive intervention under Fed. R. Civ. P. 24(b) was also unanimously affirmed. Pet. App. A18. The court of appeals emphasized that the district court retained discretion to condition Farm Interests' participation on Count 1 to such terms as would be consistent with the fair, prompt conduct of the litigation, or to order separate trial and discovery of one or more of the counts. Pet. App. A14, A17.

1991), and federal Clean Water Act, 33 U.S.C. 1251 *et seq.*, and that constitutional principles of comity, federalism, and state sovereign immunity embodied in Article III and the Tenth and Eleventh Amendments of the Constitution, required dismissal of all counts, including those counts as to which they had not been granted a right to intervene.

By order dated March 22, 1991, the Eleventh Circuit panel declined to consider the Farm Interests' "Suggestion and Motion as to Lack of Jurisdiction." Pet. App. A24-A25. The Court explained that, although "the Farm Interests may intervene in this case to protect their right to participate in the development of numeric limits implementing the state's narrative water quality standards * * *, [t]he jurisdictional issues that the Farm Interests raise in their motion are only indirectly related to the protection of this right." Pet. App. A24-A25. The court noted that "the Farm Interests are adequately represented on the jurisdictional issues by defendants South Florida Water District and Florida Department of Environmental Regulation, which have already raised many of these issues with the District Court." Pet. App. A25. Finally, the court held that, "even if the Farm Interests were proper parties to raise the jurisdictional issues in their motion, it would be procedurally inappropriate for us to extend our limited appellate review under the anomalous rule to decide issues not raised in the parties' briefs or in this Court's published opinion." *Ibid.* The court noted, however, that "[t]he Farm Interests may still seek to present their jurisdictional motion to the District Court." *Ibid.*

ARGUMENT

Petitioners do not seek further review of the Eleventh Circuit's decision respecting the scope of their right to intervene. Rather, petitioners argue that the court of appeals erred in failing to consider their post-decision motion to dismiss all four counts in the complaint for lack of jurisdiction.

Contrary to petitioners' contention, no decision of this Court or any other court of appeals holds that a court of appeals has an obligation to rule on a post-decision motion raising jurisdictional issues that exceed both the scope of the moving party's right to participate as an intervenor and the scope of an interlocutory appeal. Moreover, even if the court of appeals had an obligation to rule on petitioners' motion, petitioners' substantive contentions that the district court has no jurisdiction over this case are mistaken; settled precedent makes clear that a State has no Eleventh Amendment immunity from suit in federal court where jurisdiction is based on the presence of the United States as plaintiff.

1. Further review in this case is unwarranted because the court of appeals acted appropriately in refusing to rule on issues that were "not raised in the parties' briefs or in [the court of appeals'] published opinion" (Pet. App. A25), but instead were raised for the first time in petitioners' post-decision motion. The Federal Rules of Appellate Procedure provided ample opportunity for petitioners to submit a timely brief advancing "the contentions of [petitioners] with respect to the issues presented, and the reasons therefor." Fed. R. App. P. 28(a)(4). In addition, they were permitted to file a reply brief pursuant to Fed. R. App. P. 28(c) and to participate in oral

argument pursuant to Fed. R. App. P. 34. Petitioners chose not to use any of those mechanisms to present their jurisdictional arguments to the court of appeals. Petitioners advance no authority in support of the novel proposition that the court of appeals was required to ignore rules adopted for the orderly disposition of appeals and rule on their untimely arguments.

2. Even had petitioners chosen to advance their arguments in an orderly and timely manner before the court of appeals, the court of appeals would have acted correctly in refusing to exercise its pendent appellate jurisdiction to rule on petitioners' arguments.[7] Under the final judgment rule, the courts of appeals "have jurisdiction of appeals *from all final decisions* of the district courts." 28 U.S.C. 1291 (emphasis added). Thus, a district court's rulings on preliminary issues—including jurisdictional issues of the sort raised by petitioners—are not appealable until final judgment is reached. The fact that the court of appeals may have properly exercised its jurisdiction to review the limited issue of the district court's denial of Farm Interests' initial motion to intervene, cf. *Stringfellow* v. *Concerned Neighbors in Action*, 480 U.S. 370, 376-377 (1987), does not alter the fact that other rulings of the district court, including its determination that it had jurisdiction over this case, were not yet appealable. Thus, as petitioners themselves recognized in their motion to the Eleventh Circuit, see Mot. 3 n.2, consideration of their

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[7] Indeed, petitioners apparently contend that the court of appeals was required to rule on their motion to dismiss not only with regard to Count 1, as to which the court of appeals granted them a limited right of intervention, but also as to Counts 2, 3, and 4, as to which they are not parties.

motion to dismiss the case for lack of jurisdiction was, at best, dependent on the court of appeals' choosing, in its discretion, to exercise pendent appellate jurisdiction over otherwise nonappealable jurisdictional issues in conjunction with review of the appealable intervention issue.

This was not an appropriate case for the exercise of pendent appellate jurisdiction. Because pendent appellate jurisdiction provides an exception to the finality requirement for appellate review, it has been exercised by the courts of appeals only in extraordinary circumstances. See *Akerman* v. *Oryx Communications, Inc.*, 810 F.2d 336, 339 (2d Cir. 1987). The factors that have informed the courts of appeals' exercise of discretion to assume pendent appellate jurisdiction overwhelmingly counsel against exercise of such jurisdiction in this instance. For example, there was no overlap of appealable and nonappealable issues in this case. See, *e.g.*, *Howard* v. *Parisian, Inc.*, 807 F.2d 1560, 1565 (11th Cir. 1987); *People of Illinois ex rel. Hartigan* v. *Peters*, 861 F.2d 164, 166 (7th Cir. 1988). In addition, the record on appeal was insufficient to decide the jurisdictional issues, as illustrated by the fact that Farm Interests based its motion in part on an appendix to its motion papers containing materials that were not in the record on appeal and some of which were not in the district court record. See *Colorado* v. *Idarado Mining Co.*, 916 F.2d 1486, 1491 (10th Cir. 1990), cert. denied, 111 S. Ct. 1584 (1991). Finally, the court of appeals' decision not to rule on their motion leaves petitioners in precisely the same position they would have occupied had the district court permitted them to intervene in the first instance. Had the district court done so, they would have had no right to appeal an adverse district

court decision—even on a jurisdictional issue—until the district court issued a final judgment in the case.

Contrary to petitioners' contention (Pet. 12-13), the Eleventh Circuit's treatment of Farm Interests' motion is not inconsistent with this Court's statements that a court is obliged to examine the standing of parties to determine if Article III jurisdiction exists. See, *e.g.*, *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472 (1990) (amendment to statute at issue eliminated standing of appellee and rendered case moot); *Bender* v. *Williamsport Area School District*, 475 U.S. 534, 541 (1986) (vacating court of appeals decision because respondent had no standing to appeal); *Juidice* v. *Vail*, 430 U.S. 327, 331 (1977) (although not raised by the parties, "we are first obliged to examine the standing of appellees"). None of the cases cited by petitioners involved interlocutory appeals on limited issues. Moreover, none of those cases suggests, as petitioners would have it, that the rule requiring a court to notice jurisdictional defects obliges a court of appeals to disregard the final judgment rule and to exercise pendent appellate jurisdiction so as to rule prematurely on otherwise nonappealable issues.

3. Wholly apart from the fact that exercise of pendent appellate jurisdiction was inappropriate, petitioners have no standing to assert the sovereign immunity defenses they seek to raise. First, petitioners do not, and cannot, assert that they are entitled to sovereign immunity under the Eleventh Amendment or any other constitutional or statutory provision. Instead, petitioners seek to raise a sovereign immunity defense that is available only to third parties—the state defendants (who would be barred by the final judgment rule from presenting the question

to the court of appeals at this time). See, *e.g.*, *McGowan* v. *Maryland*, 366 U.S. 420, 429 (1961); *United States* v. *Raines*, 362 U.S. 17, 22 (1960). Moreover, their claims do not fall within any recognized exception to the general rule against third-party standing. See, *e.g.*, *Hodel* v. *Irving*, 481 U.S. 704, 711-712 (1987); *Eisenstadt* v. *Baird*, 405 U.S. 438, 443-446 (1972). Finally, petitioners' claim to third-party standing is particularly weak because their own right of intervention is narrow, limited only to Count 1.[8] As the court of appeals noted, the state defendants "have already raised many of [petitioners'] issues with the district court" (Pet. App. A25) and petitioners "are adequately represented on the jurisdictional issues by the [state] defendants." *Ibid.*[9]

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[8] Petitioners do not seek review of the court of appeals' determination that they are not entitled to intervene as to Counts 2, 3, and 4.

[9] The state defendants filed motions in the district court to dismiss this action on the following grounds: the United States had not in Counts 1 and 2 pled a viable cause of action under state law because the United States lacked standing to invoke the Florida Environmental Protection Act, Fla. Stat. Ann. § 403.412 (West 1988 & 1991), and because the subject matter was committed to the state defendants' discretionary authority; Counts 1 and 2 did not state causes of action under state or federal law; the claims did not present justiciable issues under Article III of the United States Constitution; the United States had not exhausted administrative remedies; the abstention doctrine required dismissal; the federal common law of nuisance, not state law, was applicable; and the agreements that were the subject of Counts 3 and 4 were not enforceable contracts under the governing federal law. The district court rejected all of those contentions by order entered January 12, 1990.

Petitioners accordingly have no standing to assert the State's sovereign immunity defenses.[10]

4. Finally, petitioners' substantive claim that the district court was without jurisdiction is mistaken. Article III, Section 2 of the Constitution provides that "[t]he judicial Power shall extend * * * to Controversies to which the United States shall be a Party."[11] In a long line of cases, this Court has held

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[10] Contrary to petitioners' contention (Pet. 14), it is petitioners' position in this Court, not the United States' claims in district court, which is most comparable to Eugene Diamond's status in *Diamond* v. *Charles*, 476 U.S. 54 (1986). In *Diamond* the petitioner, Eugene Diamond, was held to lack standing to defend in this Court the constitutionality of a state criminal statute. This Court concluded that only the State had standing to defend the constitutionality of its criminal statute. 476 U.S. at 64-67. The State acquiesced in the court of appeals' decision, however, and did not appeal to this Court. 476 U.S. at 63-64. In the absence of an appellant with standing on the issue presented, Diamond's appeal was dismissed for want of jurisdiction. 476 U.S. at 69, 71. Similarly, here only the State or its agencies and officials have a stake in protecting the State's alleged immunity from suit in federal court and such immunity, if it exists, is waivable by the State. Thus, if, as petitioners claim (Pet. 13), the state defendants acquiesced on appeal to federal jurisdiction, then *Diamond* would instruct that petitioners have no standing in this Court to raise such issues. Cf. *Delaware Valley Citizens' Council for Clean Air* v. *Pennsylvania*, 678 F.2d 470, 475 (3d Cir.), cert. denied, 459 U.S. 969 (1982) (entry of consent judgment was a waiver of immunity to federal court jurisdiction).

[11] Accordingly, 28 U.S.C. 1345 provides:

> Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress.

that there is no constitutional barrier to Article III jurisdiction where the United States sues a State in federal court. As the Court has stated,

> [N]othing in [the Eleventh Amendment] or any other provision of the Constitution prevents or has even been seriously supposed to prevent a State's being sued by the United States. The United States in the past has in many cases been allowed to file suits in this and other courts against States, see, *e.g.*, *United States* v. *Texas*, 143 U.S. 621; *United States* v. *California*, 297 U.S. 175, with or without specific authorization from Congress, see *United States* v. *California*, 332 U.S. 19, 26-28.

United States v. *Mississippi*, 380 U.S. 128, 140 (1965). See also *Nevada* v. *Hall*, 440 U.S. 410, 420 n.19 (1979); *Employees of the Dep't of Public Health & Welfare* v. *Dep't of Public Health & Welfare*, 411 U.S. 279, 286 (1973); *Monaco* v. *Mississippi*, 292 U.S. 313, 329 (1934) (federal jurisdiction of a suit by the United States against a State is inherent in the constitutional plan); *United States* v. *Minnesota*, 270 U.S. 181, 195 (1926).

Contrary to petitioners' contention (Pet. 14-16), neither *Pennhurst State School & Hospital* v. *Halderman*, 465 U.S. 89 (1984), nor *Atascadero State Hospital* v. *Scanlon*, 473 U.S. 234 (1985), is to the contrary. The Court's decisions in those cases were based squarely on the Eleventh Amendment, which, as the line of cases cited above has made clear, does not apply to suits brought by the United States. Moreover, the principle that Eleventh Amendment immunity does not extend to suits brought by the United States has been reiterated in cases decided since *Pennhurst* and *Atascadero*. For example, in

Pennsylvania v. *Union Gas Co.*, 491 U.S. 1, 11 (1989), the Court stated:

> [T]he Constitution presents no barrier to lawsuits brought by the United States against a State. For purposes of such lawsuits, States are naturally just like "any nongovernmental entity"; there are no special rules dictating when they may be sued by the Federal Government, nor is there a stringent interpretive principle guiding construction of statutes that appear to authorize such suits. Indeed, this Court has gone so far as to hold that *no* explicit statutory authorization is necessary before the Federal Government may sue a State.

As recently as last Term, in *Blatchford* v. *Native Village*, 111 S. Ct. 2578, 2582 (1991), this Court reaffirmed the principle that States waived their immunity against suits by the United States when they adopted the Constitution. See also *Welch* v. *Texas Dep't of Highways & Public Transportation*, 483 U.S. 468, 487 (1987); *West Virginia* v. *United States*, 479 U.S. 305, 311 (1987).

Petitioners' reliance (Pet. 15) on *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58 (1989), and *Gregory* v. *Ashcroft*, 111 S.Ct. 2395 (1991), is also in error. Both of those cases involved the question whether, as a matter of substantive law, federal statutes applied to the conduct at issue. No comparable question is presented by petitioners here. Rather, petitioners' argument is that state-law claims by the United States may be brought only in state court because no state or federal statute clearly provides that such state-law claims may also be brought in federal court. As we have shown, that argument is squarely foreclosed by this Court's decisions.

Finally, contrary to petitioners' suggestion (Pet. 14-15), Article III's grant of jurisdiction to the federal courts in suits in which the United States is a party is not limited to cases brought under federal law.[12] Article III jurisdictional requirements are satisfied by the mere presence of the United States alleging a justiciable controversy. The United States may bring state law claims, as well as federal law claims, in federal court under the jurisdiction conferred by Article III and 28 U.S.C. 1345.[13]

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[12] Petitioners err in their apparent assumption (Pet. 16) that all of the United States' claims are solely state law claims. As to the two contract claims, the right of the United States to seek redress for breach of duly authorized contractual transactions is a federal right, even though the applicable federal rule may select state law or general contract law principles. See, *e.g.*, *West Virginia* v. *United States*, 479 U.S. 305, 308-309 (1987); *Priebe & Sons, Inc.* v. *United States*, 332 U.S. 407, 411 (1947); *Clearfield Trust Co.* v. *United States*, 318 U.S. 363, 366-367 (1943).

[13] See, *e.g.*, *Loftin Cotton* v. *United States*, 52 U.S. 228, 231 (1850) (upholding United States' right to bring a civil action in federal court for trespass under state law against a person for cutting trees on public lands; the United States "may bring suits to enforce their contracts and protect their property, in the State courts, or in their own tribunals administering the same laws"); *United States* v. *California*, 655 F.2d 914, 918 (9th Cir. 1980) (the "federal government, of course may sue a state in federal court under any valid cause of action, state or federal"); *United States for and on behalf of Santa Ana Indian Pueblo* v. *University of New Mexico*, 731 F.2d 703, 705 (10th Cir.), cert. denied, 469 U.S. 853 (1984) (Constitution provided State no immunity from suit in federal court in action by United States for ejectment and trespass damages); *United States* v. *California*, 328 F.2d 729 (9th Cir.), cert. denied, 379 U.S. 817 (1964) (Constitution grants jurisdiction over civil actions brought by the United States against a State without specific consent regardless of the na-

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1991

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ture of the controversy); *United States* v. *West Virginia*, 537 F. Supp. 388 (S.D. W. Va.), aff'd on other grounds, 764 F.2d 1028 (4th Cir. 1985), aff'd, 479 U.S. 305 (1987) (holding that in contract action brought by United States, State had no constitutionally protected immunity from suit in federal court). Cf. *United States* v. *Puerto Rico*, 551 F. Supp. 864, 865 (D. P.R.), aff'd, 721 F.2d 832, 833 (1st Cir. 1983) (the United States can invoke federal jurisdiction to challenge the Commonwealth's decision on a water quality permit; the United States is not required to seek redress in Commonwealth's administrative or judicial forums).

☆ U. S. GOVERNMENT PRINTING OFFICE: 1991 282061 45102

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No. 91-212

In The

Supreme Court of the United States

October Term, 1991

WESTERN PALM BEACH COUNTY FARM BUREAU, INC., ROTH FARMS, INC. and K.W.B. FARMS,

Petitioners,

v.

UNITED STATES OF AMERICA,

FLORIDA KEYS CITIZEN COALITION, FLORIDA WILDLIFE FEDERATION, ENVIRONMENTAL DEFENSE FUND, SIERRA CLUB, NATIONAL WILDLIFE FEDERATION, WILDERNESS SOCIETY, NATIONAL PARKS & CONSERVATION ASSOCIATION, and DEFENDERS OF WILDLIFE, FLORIDA AUDUBON SOCIETY,

SOUTH FLORIDA WATER MANAGEMENT DISTRICT and TIMER E. POWERS, its Interim Executive Director, FLORIDA DEPARTMENT OF ENVIRONMENTAL REGULATION and CAROL M. BROWNER, its Secretary,

FLORIDA SUGAR CANE LEAGUE, INC., FLORIDA FRUIT and VEGETABLE ASSOCIATION, and BEARDSLEY FARMS, INC.

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITIONERS' REPLY TO THE BRIEF IN OPPOSITION

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STATUTES

The reasons for granting the Writ are now apparent, the Solicitor General having contended that an obiter dictum by Justice Brennan (Brief p. 16) has already decided for the Court that in the phrase "Controversies to which the United States shall be a Party," and only there among its repetitions in Article III, the term Controversies embodies nothing of the plan of the convention as regards the States' responsibility for their own governments; and the district judge below having held on remand that 28 USC § 1345 alone suffices a United States claim to move a sector of State government to federal court and install the judge at its head. Sta R120-21.

On November 8 in Miami the federal judge whose only decisional referents are generally worded statutes that Florida enacted exclusively for its named agencies to interpret and implement in Florida's own administrative discipline, which excludes even Florida's own judiciary, will be asked by the United States to enforce those statutes by an Order creating a new Florida regulatory Code targeting farmers and taking their lands to create for a National Park and a federal Wildlife Refuge the exquisitely pure water that the federals want but cannot claim as of any right State or federal, by statute, contract, debt, tort or common law – let alone by Constitution.

The United States asks the district court (Sta R72) to approve an Agreement which is by title a Settlement but by terms a Surrender of Florida's own governance in this sector to the federal judge. Sta R4-71. "Turning over my sword" is how Governor Chiles described the affair on May 20, in open court. This, from one of the State long ago denominated with the United States as "each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to

the other." *M'Culloch v. Maryland*, 17 US (4 Wheat) 316, 400, 410 (1819).

"This move" of State governance to federal court, as the court of appeals described it,[1] is at once the object of the suit and the means for achieving the object: "Count I of the Complaint seeks to move a state administrative task – development of standards for implementing the broad commands of the SWIM Act – to federal court."

The two defendant Florida agencies, their resistance and resources exhausted by three marathon years of federal discovery (Sta R90) on the putative issue of how stringently and strategically their new Code then in preparation ought to regulate Floridians, have now capitulated to the superior litigating power. They have Agreed with the United States, subject to court approval, to adopt and enforce a massive new Code in particulars as Agreed. Sta R4-71.

The enterprise shall be continuing and the federal district judge shall be its supreme authority. Sta R29, 30, 33. A Technical Oversight Committee, mostly federal officers, shall report "technical" needs for Florida to promulgate new governmental stringencies and strategies against its citizens – any need, for example, to condemn more land than the 25,000 acres already Agreed, Sta R23, 26-27, 51-54, 60-61 – so that the Park may be supplied water abundant and purged of phosphorus down from the level of 240 parts per billion, expressly contracted for

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[1] *United States v. South Florida Water Management Dist.*, 922 F.2d 704, 709 n. 7 (11th Cir. 1991), A 11 n. 7 (e.a.). The court added, "If the state is not doing its job *and statutory authority supports federal proceedings, this move is legally proper.*" After raising this question, the court of appeals held that petitioners could not inquire as to the answer. Pet A23, 24, 26, 30. That gives rise to Question 1 in the Petition.

by the United States and Florida in 1984, to 14 parts per billion, maximum. Pet A54, 58, Sta R12.

This absorption of State government into federal court is not founded on any claim of right by Act of Congress, the Constitution, or judge-made law. The tissue claims sounding in contract have been abandoned: the contracts struck in earlier proprietary transactions[2] by these sovereigns are so remote from the Agreement that they are not even acknowledged by its Integration Clause. Sta R30. The tissue claim of common law nuisance was abandoned when a court of appeals judge asked an elementary question at oral argument.[3] The allegation which cooked a fragment of text from an Act of Congress to make it seem preemptive is also abandoned; its supposed mandate[4] is not mentioned by the Motion in

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[2] Controversies over "duly authorized proprietary transactions" entitle "the United States to seek legal redress" in a federal court. *E.g., United States v. Little Lake Misere Land Co., Inc.*, 412 US 580, 593 (1973). Counts III and IV sounding in contract composed nonexistent State promises for the texts of two earlier contracts, Pet A47-50, A54-72, Pet p. 10-11, and alleged as breach that the State had not adopted the Code sought directly by Count I. It was not alleged that Florida breached any promise it *did* make.

[3] 922 F.2d at 711 n. 10, Pet A17 n. 10: "There is some dispute as to whether the United States has a fifth count for common law nuisance lurking in its Amended Complaint. . . . The United States clarified in oral argument, however, that it is referring to Fla. Stat § 373.433, which declares acts in violation of the state's permit and water quality requirements to be a statutory nuisance. The nuisance claim, then, does not add a substantive count to the United States's other claims arising under state law.

[4] The nearest allegation of a federal statutory claim was a purported quotation from the Park's authorizing Act that "no

(Continued on following page)

reciting the laws supposedly fulfilled by this Agreement. Those tissue claims having eased the complaint through a risibility test for failure-to-state-a-claim,[5] they are now forgotten.

The United States Motion to Approve precisely identifies "the statutes and regulations the United States seeks in this litigation to enforce." Sta R84. All are Florida statutes and rules, all bespeak general policies in malleable terms, and all were promulgated for the derivation of effective meaning and strategic mission in Florida's unique administrative process, Chapter 120 Florida Statutes, whose chief distinction are the opportunities given an affected party "to change the agency's mind" by evidence and commentary by an independent hearing officer – whereby, perhaps, regulators can be moved from their normal condition of predisposed certitude, through a "sobering realization their policies lack convincing wisdom," to a Final Agency Action of greater integrity. The process was ably described by Professor Levinson's affidavit in support of the district court stay motion, Sta R107 et seq., and is elaborated by numerous Florida

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(Continued from previous page)

development of the project or plan . . . shall be undertaken which will interfere with preservation intact of the unique flora and fauna." Am. Comp. Pet A42. The deleted words were "for the entertainment of visitors." 16 USC § 410a.

[5] *See Kasper v. Board of Election Com'rs of City of Chicago*, 814 F.2d 332, 338 (7th Cir. 1987), describing "the risibility standard of *Hagans v. Lavine*," 415 US 528, 542-43 (1974): "[U]nless it is impossible to read the complaint with a straight face or the contention was recently and authoritatively rejected, there is federal jurisdiction even if the claim must fail on the merits."

judicial decisions in lineage from *McDonald v. Dept. of Banking and Finance,* 346 So.2d 569 (Fla. 1st DCA 1978).

The extraordinary writ of prohibition protects that process from judicial intrusion by Florida courts. *E.g., State ex rel. Dept. of General Serv. v. Willis,* 344 So.2d 580 (Fla. 1st DCA 1977).

That is Florida's self-government as prescribed by its laws. By "moving" such governance to federal court this litigation destroys that government. The court of appeals purported to substitute a "corresponding" and by implication equivalent "right to participate in the [federal] judicial proceedings," *United States v. South Florida Water Management Dist.*, 922 F.2d 704, 709 (11th Cir. 1991), Pet A 11 n. 7, which of course have now composed an Agreement in negotiations that entirely excluded petitioners.

The Brief in Opposition affects an understanding we contend, for petitioners, "that state-law claims by the United States may be brought only in state court because no state or federal statute clearly provides that such state-law claims may also be brought in federal courts." Brief in Opposition, p. 16. On the contrary, any State court suit of this sort, by anyone, would have been dismissed two years ago, if not at once.[6] What we protest to this Court is

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[6] A Florida statute not referenced by the complaint (Pet A34) or court of appeals Opinion, § 403.412 Florida Statutes, authorizes a limited action in a Florida circuit court (not a federal district court) by named parties (not the United States) to compel the undertaking of allegedly neglected regulatory action by a Florida agency. Pet A31. Such an action in a Florida court would not have survived the Water District's publication of a draft SWIM regulatory plan in August 1989. The court of appeals recognized also that the agency "is currently working on a final version." 922 F.2d at 708, Pet A9.

the federal judicial power subjugating Florida's government and performing its sovereign functions on no plausible claim of right except that the United States demands it.

2.

This Court in *Pennhurst* declared it "difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law."[7]

This affair stands for several more turns of that screw:

• Here the court will instruct the State officials on what regulatory Code they shall promulgate under State law, the sovereign's very composition of a governance text.

• Florida has committed its Codemaking to a distinctive governmental process that is treasured for affording citizens a real opportunity, and in time, to "change the agency's mind" by evidence on all issues of interpretation, policy and strategy, as well as of fact. Judges who are unpracticed in that distinctive State governance which they are asked to replace – the 11th Circuit alluded to petitioners' right "to participate and comment," 922 F.2d at 708, Pet A10, betraying the federal frame of reference – are naturally apt to degrade the unfamiliar style of governance in finding it unprotectable, 922 F.2d at 710, Pet A15; or even to suppose that federal adjudication will "correspond" to the State governance lost. 922 F.2d 704, 709 n. 7, Pet A 11 n. 7. The citizen thus loses both the

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[7] *Pennhurst State School & Hosp. v. Halderman*, 465 US 89, 106 (1984).

authority of State governance and, in Florida's case, a particular discipline with law texts which is *not* the accustomed federal judicial method.[8]

• When "the plan of the convention" and the text of Article III require no greater sensitivity to jeopardized sovereign interests, the lenient standards for federal pleading are readily evaded by tissue allegations such as the United States fabricated from law texts and exhibited contracts, *supra* ns. 2, 3 and 4. The United States Attorney exploited other obscurities in its pleading in 1989 to coax and calm the district judge about his designs upon State sovereignty, "The business of putting a numerical limit on total phosphorous, that is within that separate process. . . . We are not asking for a number"; and then to tell the court of appeals, in 1990, the exact opposite: "The only thing that we are concerned with in this lawsuit is a numerical standard for the vegetation in the Park and the Refuge." Noted and quoted by the court of appeals, 922 F.2d 704, 708 f. 6, Pet A8, 9 n. 6. The proposed Settlement Agreement now specifies that Park number at 14 ppb maximum, Sta R41, one-seventeenth the limit agreed to three years before this litigation began, and reserves power in the Technical Oversight Committee to lower the standard still further. Sta R44. The prospect of this sort of scenario in *Littleton v. Berbling*, 468 F.2d 389, 392 (7th Cir. 1972), was entirely disapproved in *O'Shea v. Littleton*, 414 US 488, 495 (1974).

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[8] *E.g., United States v. Little Lake Misere Land Co., Inc.*, 412 US 580, 593 (1973): "[T]he inevitable incompleteness presented by all legislation means that interstitial federal lawmaking is a basic responsibility of the federal courts." This of course accounts for the court of appeals all too comfortably describing Florida's "Narrative State Law Standards" in the terms suggested by the United States. 933 F.2d 704, 707, Pet A7.

• The crushing attrition of federal litigation gathers still more power against sovereign State governance and a citizen's interest in its preservation by that remarkable new device, the Settlement Agreement. Without *any significant adjudication* having taken place in the federal district court, the exhausted defendant agencies have now Agreed that the district judge shall have permanent jurisdiction as the authentic power behind the State's governance in this sector.

3.

The States having "entered the federal system with their sovereignty intact," *Blatchford v. Native Village of Noatak*, 111 S.Ct. 2578, 2581 (1991), is it not so that "the judicial authority in Article III is limited by this sovereignty," *Id.*, even when it is the United States who asks a federal judge to compel State governance of a particular sort? It would hardly be of any moment that this Court protects "the usual constitutional balance between the States and the Federal Government" when the power is invoked by an ordinary citizen, *Atascadero State Hosp. v. Scanlon*, 473 US 234, 242 (1984), if the Court is unwilling to read the same Article III as limiting those same powers when invoked by the United States.

Put another way, if Article III constrains this Court to read closely and for plain statements any Act of Congress that a private litigant claims has "alter[ed] sensitive federal-state relationships" in creating his claim for relief, *United States v. Bass*, 404 US 336, 349 (1971), on what principle would Article III not require the same when a United States lawyer who makes the sort of claim as quoted *supra* n. 4? *See also Rice v. Santa Fe Elevator Corp.*, 331 US 218, 230 (1947). Why would the text of a State-United States contract, said to have promised new State regulations having certain

stringencies against targeted citizens, not also be examined for a clear statement of the promise that allegedly creates the Controversy? *Supra* n. 2.

"[W]e have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition of our constitutional structure which it confirms." *Blatchford*, 111 S.Ct. at 2581. From that understanding, and from the State's "constitutional responsibility for the establishment and operation of its own government," *Sugarman v. Dougall*, 413 US 634, 647 (1973), the Court derived the "clear statement" principles expressed by *Will v. Michigan Dept. of State Police*, 491 US 58, 65 (1989) and *Gregory v. Ashcroft*, 111 S.Ct. 2395 (1991), which guard the integrity of any consent to suit that a State has given "either expressly or in the 'plan of the convention.' " *Blatchford, Id.*

Justice Brennan never accepted that derivation, *e.g. Will v. Michigan Dept. of State Police*, 491 US 58, 71 (1989), and so wrote dicta for a majority (a plurality, excepting Justice Scalia?) in *Pennsylvania v. Union Gas Co.*, 491 US 1, 11 (1989), needlessly in aid of a statutory interpretation, that "there are no special rules dictating when [States] may be sued by the Federal Government," which may be true, and "nor is there a stringent interpretive principle guiding construction of statutes that appear to authorize such suits," which cannot be true unless Article III bespeaks variant meanings of the term Controversies as used by its text.

At any rate this case presents the pure question, is fully mature, and is appropriate for examining "the doctrine of intergovernmental immunity enunciated in *M'Culloch v. Maryland*, 4 Wheat 316, 4 L Ed 579 (1819), however it may have evolved since that decision,"

Rehnquist, J., in *United States v. Little Lake Misere Land Co., Inc.*, 412 US 580, 608 (1973).

United States v. Texas, 143 US 621, 646 (1892) declared the "plan of the convention" to have been as *M'Culloch v. Maryland* described it:

> The submission to judicial solution of controversies arising between these two governments, "each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other," *McCulloch v. State of Maryland* . . . , but both subject to the supreme law of the land, does no violence to the inherent nature of sovereignty. The States of the Union have agreed, in the Constitution, that the judicial power of the United States shall extend . . . to controversies to which the United States shall be a party, without regard to the subject of such controversies.

The decisive question is not whether Florida may be sued in a federal court, but what is the duty of that court, in these circumstances, in respect to proceeding upon that alleged "controversy."

These petitioners were entitled to ask the court of appeals to decide whether that litigation could continue without exceeding the Article III limitations. That question is always pertinent, and cannot be boxed into conventional notions of standing, waiver and the like – such as the Brief in Opposition recites. *See Pennsylvania v. Union Gas Co., supra*, 491 US 1, 25-26 (Stevens, J., concurring).

The petition should be granted.

Respectfully submitted,

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